Supreme Court, U.S.
FILED

02 722 NOV 7 2002

OFFICE OF THE CLERK

No. 02-

In the Supreme Court of the United States

AMERICAN INSURANCE ASSOCIATION, AMERICAN RE-INSURANCE COMPANY, *ET AL.*,

Petitioners,

v.

HARRY LOW, IN HIS CAPACITY AS COMMISSIONER OF INSURANCE FOR THE STATE OF CALIFORNIA,

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

PETITION FOR A WRIT OF CERTIORARI

STEPHEN M. SHAPIRO
Mayer, Brown, Rowe & Maw
190 South LaSalle Street
Chicago, IL 60603
(312) 782-0600

NEIL M. SOLTMAN
Mayer, Brown, Rowe & Maw
350 South Grand Avenue
Los Angeles, CA 90071
(213) 229-9500

KENNETH S. GELLER
Counsel of Record
JOHN J. SULLIVAN
Mayer, Brown, Rowe & Maw
1909 K Street, N.W.
Washington, DC 20006
(202) 263-3000

Counsel for Petitioners American Insurance Association and American Re-Insurance Company

[*Additional Counsel Listed Inside Cover*]

123 pp

PETER SIMSHAUSER
Skadden, Arps, Slate, Meagher & Flom LLP
300 South Grand Avenue
Los Angeles, CA 90071
(213) 687-5000

Counsel for Petitioner
Assicurazioni Generali S.p.A.

WILLIAM H. WEBSTER
Milbank, Tweed, Hadley & McCloy LLP
1825 Eye Street, N.W.
Washington, DC 20006
(202) 835-7500

LINDA DAKIN-GRIMM
SALLY AGEL
Milbank, Tweed, Hadley & McCloy LLP
601 South Figueroa Street
Los Angeles, CA 90017
(213) 892-4000

Counsel for Petitioners Winterthur International America Insurance Company; Winterthur International America Underwriters Insurance Company; General Casualty Company of Wisconsin; Regent Insurance Company; Southern Insurance Company; Unigard Indemnity Company; Unigard Insurance Company; and Blue Ridge Insurance Company

QUESTIONS PRESENTED

California's Holocaust Victim Insurance Relief Act ("HVIRA") requires California insurers to provide extensive information regarding every insurance policy issued in Nazi-dominated Europe between 1920 and 1945 by any insurer with which the California insurer now has a legal relationship. The district court enjoined enforcement of the Act on three constitutional grounds: interference with the federal government's power over foreign affairs, due process, and the Foreign Commerce Clause. Over the objections of the U.S. government and affected foreign governments, and in direct conflict with *Gerling Global Reinsurance Corp.* v. *Gallagher*, 267 F.3d 1228 (11th Cir. 2001), the Ninth Circuit reversed and upheld the HVIRA in all respects.

The questions presented are:

1. Whether the HVIRA, which the U.S. government has called an "actual interference" with U.S. foreign policy, and which affected foreign governments have protested as inconsistent with international agreements, violates the foreign affairs doctrine of *Zschernig* v. *Miller*, 389 U.S. 429 (1968).

2. Whether the HVIRA, which attempts to regulate insurance transactions that occurred overseas between foreign parties more than half a century ago, exceeds California's legislative jurisdiction under the Due Process Clause.

3. Whether the McCarran-Ferguson Act, 15 U.S.C. §§ 1011-1015, insulates the HVIRA from review under the Foreign Commerce Clause.

LIST OF PARTIES AND RULE 29.6 STATEMENT

The petitioners are: American Insurance Association ("AIA"), American Re-Insurance Company, Winterthur International America Insurance Company, Winterthur International America Underwriters Insurance Company, General Casualty Company of Wisconsin, Regent Insurance Company, Southern Insurance Company, Unigard Indemnity Company, Unigard Insurance Company, Blue Ridge Insurance Company, and Assicurazioni Generali S.p.A. In addition, Gerling Global Reinsurance Corporation of America, Gerling Global Reinsurance Corporation-U.S. Branch, Gerling Global Life Reinsurance Company, Gerling Global Life Insurance Company, Gerling America Insurance Company, and Constitution Insurance Company were parties to the proceedings below. The respondent, Harry Low, is the Commissioner of Insurance for the State of California.

AIA has no parent company, and no publicly held company owns stock in AIA.

American Re-Insurance Company is a wholly owned subsidiary of American Re Corporation, which is wholly owned by Munich-American Holding Company. Munich-American Holding Company is wholly owned by Muenchener Rueckversicherungs-Gesellschaft Aktiengesellschaft.

General Casualty Company of Wisconsin, Regent Insurance Company, Southern Insurance Company, Unigard Indemnity Company, Unigard Insurance Company, and Blue Ridge Insurance Company state that the following companies are parents or publicly held companies that own ten percent or more of their stock:

Winterthur U.S. Holdings, Inc. (parent and owner of more than ten percent of stock);

Winterthur Swiss Insurance Group (parent); and

Credit Suisse Group (parent).

Winterthur International America Insurance Company and Winterthur International America Underwriters Insurance Company are wholly owned by XL America Inc., which in turn is wholly owned by XL Capital Ltd.

Assicurazioni Generali S.p.A. ("Generali"), an Italian corporation, has no parent corporation. Mediobanca S.p.A., a publicly held company, owns slightly more than ten percent of Generali's stock.

TABLE OF CONTENTS

Page

QUESTIONS PRESENTED I

LIST OF PARTIES AND RULE 29.6 STATEMENT ii

TABLE OF AUTHORITIES vi

OPINIONS BELOW 1

JURISDICTION 1

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED 1

STATEMENT 1

A. U.S. Foreign Policy On Holocaust-Era Claims 3

1. Executive Agreement on the German Foundation 3

2. Other Foreign Foundations and Commissions 5

B. California's Regulation of Holocaust-Era Insurance Policies 6

C. Complaints By U.S. Officials That The HVIRA Conflicts With U.S. Foreign Policy 8

D. The Preliminary Injunction 9

E. The District Court's Permanent Injunction And Reversal By the Ninth Circuit 11

REASONS FOR GRANTING THE PETITION 12

I. THE NINTH CIRCUIT ERRED IN REFUSING TO APPLY THE FOREIGN AFFAIRS DOCTRINE TO A STATE STATUTE "IN DIRECT CONFLICT WITH" U.S. FOREIGN POLICY 12

TABLE OF CONTENTS — Continued

Page

A. The Decision Is In Direct Conflict With *Zschernig* 14

B. The Decision Conflicts With The First Circuit's Decision In *Natsios* 18

C. The Decision Interferes With U.S. Foreign Policy In An Area Of Vital International Concern 19

II. THE NINTH CIRCUIT FAILED TO APPLY THIS COURT'S DUE PROCESS PRECEDENTS AND CREATED A CONFLICT WITH THE ELEVENTH CIRCUIT'S DECISION IN *GERLING* 20

III. THE NINTH CIRCUIT'S INTERPRETATION OF THE McCARRAN-FERGUSON ACT CONFLICTS WITH THIS COURT'S HOLDINGS AND ENCOURAGES STATE INTERFERENCE WITH FOREIGN COMMERCE 24

A. The HVIRA Violates The Foreign Commerce Clause 24

B. The Ninth Circuit Erred In Holding That The McCarran-Ferguson Act Shields The HVIRA From Commerce Clause Scrutiny 25

C. The Ninth Circuit's Purported Distinction Of *Travelers* Is Unavailing 26

CONCLUSION 30

TABLE OF AUTHORITIES

Cases: **Page(s)**

Agostini v. *Felton*, 521 U.S. 203 (1997) 16

Alfred Dunhill of London, Inc. v. *Republic of Cuba*, 425 U.S. 682 (1976) 20

Allgeyer v. *Louisiana*, 165 U.S. 578 (1897) 28, 29

Allstate Ins. Co. v. *Hague*, 449 U.S. 302 (1981) 20

Asahi Metal Indus. v. *Superior Court*, 480 U.S. 102 (1981) 24

BMW of North Am., Inc. v. *Gore*, 517 U.S. 559 (1996) 26

Banco Nacional de Cuba v. *Sabbatino*, 376 U.S. 398 (1964) 20

Christopher v. *Harbury*, 122 S. Ct. 2179 (2002) 19

Chy Lung v. *Freeman*, 92 U.S. 275 (1875) 14, 17

Connecticut General Life Ins. Co. v. *Johnson*, 303 U.S. 77 (1938) 28, 29

Crosby v. *National Foreign Trade Council*, 530 U.S. 363 (2000) ..... *passim*

Dames & Moore v. *Regan*, 453 U.S. 654 (1981) 19

Federal Trade Comm'n v. *Travelers Health Ass'n*, 362 U.S. 293 (1960) ..... *passim*

First National City Bank v. *Banco Nacional of Cuba*, 406 U.S. 759 (1972) 20

Gerling Global Reinsurance Corp. v. *Gallagher*, 267 F.3d 1228 (11th Cir. 2001) ..... *passim*

Group Life & Health Ins. Co. v. *Royal Drug Co.*, 440 U.S. 205 (1979) 28

TABLE OF AUTHORITIES — Continued

Page(s)

Healy v. *Beer Institute*, 491 U.S. 324 (1989) 26

Home Ins. Co. v. *Dick*, 281 U.S. 397 (1930) 20

JPMorgan Chase Bank v. *Traffic Stream (BVI) Infrastructure Ltd.*, 122 S. Ct. 2054 (2002) 19

Japan Line, Ltd. v. *County of Los Angeles*, 441 U.S. 434 (1979) 24, 25

McCluney v. *Jos. Schlitz Brewing Co.*, 649 F.2d 578 (8th Cir.), aff'd, 454 U.S. 1071 (1981) 20

National Foreign Trade Council v. *Natsios*, 181 F.3d 38 (1st Cir. 1999) 18, 19

Phillips Petroleum Co. v. *Shutts*, 472 U.S. 797 (1985) 20, 21

Regan v. *Wald*, 468 U.S. 222 (1984) 20

St. Louis Cotton Compress Co. v. *Arkansas*, 260 U.S. 346 (1922) 28, 29

United States Dept. of Treasury v. *Fabe*, 508 U.S. 491 (1993) 28

United States v. *Pink*, 315 U.S. 203 (1942) 14

United States v. *South-Eastern Underwriters Ass'n*, 322 U.S. 533 (1944) 28

Verlinden B.V. v. *Central Bank of Nigeria*, 461 U.S. 480 (1983) 19

Weinberger v. *Rossi*, 456 U.S. 25 (1982) 19-20

Zschernig v. *Miller*, 389 U.S. 429 (1968) ..... *passim*

TABLE OF AUTHORITIES — Continued

Page(s)

Statutes:

15 U.S.C. §§ 1011-1015 ..... *passim*

15 U.S.C. § 1012(a) 25, 27

15 U.S.C. § 1012(b) 27

28 U.S.C. § 1254(1) 1

U.S. Holocaust Assets Commission Act of 1998, 22 U.S.C. § 1621 25

Cal. Code Civ. P. § 354.5 7

Cal. Code Civ. P. § 354.5(a)(2) 8

Cal. Code Civ. P. § 354.5(a)(3) 7

Cal. Ins. Code §§ 13800-13807 ..... *passim*

Cal. Ins. Code § 13801 22

Cal. Ins. Code § 13801(d) 21

Cal. Ins. Code § 13801(f) 15

Cal. Ins. Code § 13802(a) 7

Cal. Ins. Code § 13802(b) 7

Cal. Ins. Code § 13803 6

Cal. Ins. Code § 13804 6

Cal. Ins. Code § 13804(a) 6, 7

Cal. Ins. Code § 13804(b) 6

Cal. Ins. Code § 13806 7

TABLE OF AUTHORITIES — Continued

Page(s)

Miscellaneous:

H.R. Rep. No.142, 79th Cong., 1st Sess. (1945) 28, 29

THE FEDERALIST NO. 22 16

U.S. Agrees to Facilitate Talks on Holocaust-Era Claims, AGENCE FRANCE PRESSE, July 18, 2001 5

PETITION FOR A WRIT OF CERTIORARI

OPINIONS BELOW

The opinion of the court of appeals reversing the district court's permanent injunction (App., *infra*, 1a-33a) is reported at 296 F.3d 832. The opinion of the court of appeals reviewing the district court's preliminary injunction (App., *infra*, 34a-60a) is reported at 240 F.3d 739. The opinion of the district court granting a permanent injunction (App., *infra*, 61a-84a) is reported at 186 F. Supp.2d 1099. The district court's preliminary injunction opinion (App., *infra*, 85a-113a) is unpublished.

JURISDICTION

The judgment of the court of appeals was entered on July 15, 2002. The court of appeals denied rehearing on September 9, 2002. App., *infra*, 3a-4a. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The relevant text of the Due Process Clause, the Commerce Clause, the McCarran-Ferguson Act, 15 U.S.C. §§ 1011-1015, and the Holocaust Victim Insurance Relief Act, Cal. Ins. Code §§ 13800-13807, is set forth in the appendix (App., *infra* 114a-122a).

STATEMENT

After years of negotiations at the highest levels, the United States has reached agreements with foreign nations to achieve a prompt and comprehensive resolution of Holocaust-era insurance claims. An international commission has been established with authority to resolve claims. Payments are to be made from funds contributed by insurers, the German government and private industry. In return, the United States has committed to assist insurers in obtaining "legal peace" in this country, including protection against state legislative and regulatory action.

Dissatisfied with U.S. diplomatic efforts, the California legislature enacted a bill in 1999 designed to encourage and facilitate litigation over Holocaust-era insurance claims in California courts. The Holocaust Victim Insurance Relief Act, Cal. Ins. Code §§ 13800-13807 ("HVIRA"), which is part of that bill, requires insurers licensed to do business in California to provide records regarding each insurance policy issued by any European corporate relative and in effect in Nazi-occupied Europe between 1920 and 1945, for use in litigation in California. The HVIRA thus requires action by European insurers on policies that were written in Europe, under European laws, and sold to Europeans as long as 80 years ago, and imposes the penalty of license suspension on their California affiliates if they do not comply, even in cases where production of the information would violate foreign privacy laws. Other parts of the bill create a cause of action for Holocaust-era insurance claims and waive the applicable limitations period.

The United States has stated unequivocally that "the premise of the California legislation is in direct conflict with that of United States foreign policy"(2001 U.S. *En Banc Amicus* Br. 1), and affected foreign governments have lodged formal protests in court. The Eleventh Circuit has struck down substantially identical legislation enacted in Florida. *Gerling Global Reinsurance Corp.* v. *Gallagher*, 267 F.3d 1228 (2001).

Without so much as mentioning the submissions of the United States or the foreign governments, and distinguishing the Eleventh Circuit decision on transparently implausible grounds, the Ninth Circuit upheld the HVIRA against all constitutional objections. The decision thus presents a clear conflict between the circuits, as well as with official U.S. foreign policy. If it is allowed to stand, American assurances regarding the resolution of Holocaust-era claims will be cast into doubt, relations with our allies will be undermined, and the ability of the United States to speak with one voice in the field of foreign affairs will be severely compromised. Moreover, the precedent so established — that states may engage in their own

attempts to solve international problems, in disregard of U.S. foreign policy, the limits of state power over foreign commerce, and the lack of state legislative jurisdiction — has extraordinary constitutional importance. See *Crosby* v. *National Foreign Trade Council*, 530 U.S. 363 (2000).

A. U.S. Foreign Policy On Holocaust-Era Claims.

1. Executive Agreement on the German Foundation.

The United States has been "involved in compensating Holocaust victims since the end of World War II." App., *infra*, 97a. It has now completed the last major post-war negotiation with Germany "to bring some measure of justice" to Holocaust survivors. *Id.* at 126a-127a. In July 2000, President Clinton and German Chancellor Schroeder successfully completed negotiations for creation of the "Foundation, 'Remembrance, Responsibility and the Future,'" funded by the German government and German corporations to resolve the claims of those "who suffered at the hands of German banks, insurance companies, and other German companies." ER 1748-1749.[1] In return for creation of a 10 billion Deutschemark ($5 billion) Foundation to pay Holocaust claims, the President pledged to take "unprecedented steps" on behalf of the United States — including the filing of statements of interest in litigation in U.S. courts against German companies over Holocaust claims — to have the Foundation "regarded as the exclusive remedy for all claims against German companies." *Ibid.* One billion Deutschemarks "will go to property claims and insurance claims, as well as property and insurance humanitarian funds." ER 2272.

Deputy Secretary of the Treasury Stuart Eizenstat, the principal U.S. representative in negotiations on the German Foundation, explained that the "crucial element" in convincing German companies to participate in the Foundation was the

---

[1] "ER" refers to the Excerpts of Record in the preliminary injunction appeal and "SER" refers to the Supplemental Excerpts of Record in the permanent injunction appeal.

assurance "that they not pay twice, once into this foundation and a second time into U.S. courts." ER 1872-1881. Secretary of State Madeleine Albright similarly observed that (ER 1750-1752):

> [t]he United States is agreeing to assist in providing legal peace to German companies, both in our courts and from state and local action. * * * Chancellor Schroeder and the German companies took the lead in proposing the Foundation as an alternative to endless litigation that would have drained everyone and satisfied no one.

In Article 1 of the Executive Agreement between the United States and Germany, the parties agreed that the Foundation should be "the exclusive remedy and forum for the resolution of all claims that have been or may be asserted against German companies arising from the National Socialist era and World War II." App., *infra*, 155a. Article 2 imposes two duties on the United States government: (1) to "inform its courts through a Statement of Interest * * * that it would be in the foreign policy interests of the United States for the Foundation to be the exclusive remedy and forum for resolving [Holocaust-era] claims asserted against German companies"; and (2) to "use its best efforts" "with state and local governments" to achieve "all-embracing and enduring legal peace" for German companies. *Id.* at 156a. Finally, the Agreement mandates that insurance claims against German insurance companies that come within the scope of the current claims-handling procedures adopted by the International Commission on Holocaust Era Insurance Claims ("ICHEIC") "shall be processed * * * on the basis of such procedures and on the basis of additional claims handling procedures that may be agreed among the Foundation, ICHEIC, and the German Insurance Association." *Ibid.*

ICHEIC was established in 1998 to investigate and resolve Holocaust-era insurance claims. Deputy Secretary Eizenstat testified before Congress that the "U.S. Government has supported [ICHEIC] since it began, and we believe it should be

considered the exclusive remedy for resolving insurance claims from the World War II era." ER 1905. Negotiations involving ICHEIC, the German Foundation, and the German Insurance Association have culminated in an agreement on claims handling procedures and other related issues. App., *infra*, 177a. The Bush Administration intervened to "facilitate" these negotiations. *US Agrees to Facilitate Talks on Holocaust-Era Claims*, AGENCE FRANCE PRESSE, July 18, 2001.

President Bush and Chancellor Schroeder have recently reaffirmed their commitment to the Executive Agreement on the German Foundation and its goal of "all embracing and enduring legal peace." App. *infra*, 172a. In addition, as Ambassador Randolph Bell, President Bush's Special Envoy for Holocaust Issues, told Congress on September 24, 2002, the United States continues to believe that ICHEIC, should be "the *exclusive remedy* for unresolved insurance claims from the National Socialist era and World War II." *Id.* at 177a (emphasis added).

2. Other Foreign Foundations and Commissions.

The United States has concluded an Executive Agreement with Austria similar to its Agreement with Germany. 2001 U.S. *En Banc Amicus* Br. 14. Other European nations, including France, Belgium, the Netherlands, and Italy, have agreed to support commissions and foundations in their own countries. See App., *infra*, 134a-150a; SER 1623, 1908.

In January 2000, the United States and Switzerland issued a Joint Statement addressing the issue of unpaid Holocaust-era insurance policies. SER 1263-1274. The United States again identified ICHEIC as the "appropriate forum for resolving Holocaust-related issues." SER 1267. Switzerland and the United States condemned as "potentially disruptive and counterproductive * * * investigative initiatives" that impose reporting requirements. *Ibid.* The governments agreed that the United States would "call on" state insurance commissioners and legislatures "to refrain from taking unwarranted investiga-

tive initiatives or from threatening or actually using sanctions against Swiss insurers." SER 1272.

Referring to these international initiatives, Deputy Secretary Eizenstat stated that U.S. policy (ER 2271)

> on Holocaust issues * * * serves important U.S. foreign policy interests, such as maintaining close relations with Germany, a partner of ours in promoting and defending democracy for the last fifty years and a nation that is vital to both the security and economic development of Europe and, with Switzerland, a major trading partner.

B. California's Regulation of Holocaust-Era Insurance Policies.

In the midst of these wide-ranging diplomatic efforts, the California legislature enacted the HVIRA. The statute requires the California Insurance Commissioner to establish a "Holocaust Era Insurance Registry" to maintain "records and information" on all "life, property, liability, health, annuities, dowry, educational, or casualty" insurance policies "in effect between 1920 and 1945" that were sold by a California "insurer," either "directly or through a related company," to persons in Nazi-occupied Europe. §§ 13803-13804.

The HVIRA provides that each "insurer currently doing business in the state" that sold Holocaust-era policies directly to individuals, or that is "related" to a company that sold Holocaust-era policies, must file detailed reports with the Insurance Commissioner specifying (1) the number of policies the insurer or its related company had in effect during this 25-year period; (2) the name of the holder and beneficiary of each of those policies, and the "current status" of each policy; and (3) the "city of origin, domicile, or address" for each policyholder. § 13804(a). The HVIRA further requires that, for each such policy, the insurer must state, under the threat of criminal penalty (§ 13804(b)), whether the policy has been paid, whether diligence has been used to identify beneficiaries, and whether

unclaimed funds have been distributed to charitable organizations. App., *infra*, 119a-121a.

Through an expansive definition of "related company," the HVIRA extends these requirements to California insurers that never issued any policies in Nazi-occupied Europe but that now have a corporate "parent, subsidiary, reinsurer, successor in interest, managing general agent, or affiliate" that did. § 13802(b). The Act also requires insurers to file reports not only on policies that were held by "Holocaust victim[s]" — defined as any "person who was persecuted during the period 1929 to 1945, inclusive, by Nazi Germany, its allies, or sympathizers," § 13802(a) — *but on all policies held by all persons in Europe between 1920 and 1945*. § 13804(a). Finally, the Act directs the Commissioner to "suspend" the "certificate of authority to conduct insurance business in the state" of any insurer that does not comply with its requirements. § 13806.

The HVIRA is an integral part of a comprehensive California Holocaust compensation program, designed to enable Holocaust victims and their heirs to file lawsuits in California under California law to compel payment of Holocaust-era insurance claims that arose outside the State (and, indeed, outside the United States). In related sections of the same bill that enacted the HVIRA, the legislature amended § 354.5 of the Code of Civil Procedure to create a California forum for Holocaust-era insurance litigation and to override any applicable statutes of limitations under foreign law.

This legislation also circumvents otherwise applicable jurisdictional limits by authorizing suit against an entity other than the issuer of a Holocaust-era policy. Any insurer doing business in California may be held liable for a Holocaust-era policy issued by any of its "related compan[ies]" — whether or not the California company exercises any control over that related company. § 354.5(a)(3). It is not even necessary for the companies to have been related at the time the policy was issued, so long as they are related at the time of suit. *Ibid.*

Under this scheme, a California insurer that was established in 2001 would be forced to pay a civil claim arising from a 1921 insurance policy, so long as the European entity that issued the policy is now a corporate "parent, subsidiary, reinsurer, successor in interest, managing general agent, or affiliate" of the California insurer. § 354.5(a)(2).

C. Complaints By U.S. Officials That The HVIRA Conflicts With U.S. Foreign Policy.

Shortly after the HVIRA was enacted, Deputy Secretary Eizenstat wrote to California Governor Gray Davis and Insurance Commissioner Chuck Quackenbush complaining of the serious disruption of U.S. foreign policy caused by the HVIRA. He warned the Governor that the HVIRA "ha[s] already potentially damaged and could derail [German Foundation] negotiations and the progress already achieved by [ICHEIC]," because, "for th[e German Foundation] deal to work[,] * * * German industry and the German government need to be assured that they will get 'legal peace,' not just from class-action lawsuits, but from the kind of legislation represented by the [HVIRA]." App., *infra*, 124a.

In his letter to the Commissioner, the Deputy Secretary criticized the HVIRA as having "the unfortunate effect of damaging the one effective means now at hand to process quickly and completely unpaid insurance claims from the Holocaust period, [ICHEIC], in which you yourself have been so engaged." ER 1973-1974. He made clear (*id.* at 1974) that California's actions "threaten[ing] * * * sanctions against German insurers could complicate my ability to resolve the other claims against German companies for the benefit of Holocaust survivors."

In April 2000, Deputy Secretary Eizenstat explained to the Senate Foreign Relations Committee that the HVIRA threatened to undermine the progress made in resolving Holocaust-era claims. He testified that he corresponded with (ER 2277):

> the state insurance commissioners in Washington State and California, emphasizing my strong support for the international efforts to create a claims settlement process * * * and stressing that, in their legitimate concern for Holocaust survivors, proposed actions in these states could undermine the work of the ICHEIC.

Deputy Secretary Eizenstat underscored that the federal government's support of ICHEIC was "link[ed]" in important ways to the Nation's general "policy on Holocaust issues," which, in turn, furthers "important U.S. foreign policy interests" across Europe. ER 2271, 2276.

D. The Preliminary Injunction.

Despite the federal government's pleas for non-interference, Commissioner Quackenbush announced a policy of immediate and rigorous enforcement of the HVIRA. ER 1982-1989. He subpoenaed insurers to testify at hearings as to their readiness to comply and told the companies to either produce the required records or "leave the State." ER 1986-1988. The Commissioner also offered his judgment that the international process for claims resolution "has not succeeded to this date, and California can't wait around any longer. It is your choice now whether you're going * * * to bring your company in full compliance, whether you're going to leave the state voluntarily, or whether I'm going to kick you out." ER 1989.

Petitioners thereafter filed suit to challenge the constitutionality of the Act and sought a preliminary injunction to protect against immediate enforcement. The district court granted the preliminary injunction, determining that petitioners "ha[d] shown a probability of success on the merits of their claim[s] and ha[d] shown that irreparable harm will occur if the court does not enjoin enforcement of the HVIRA." App., *infra*, 113a.

In an extensive opinion relying on decisions of this Court, the district court held that the HVIRA was likely to be facially unconstitutional on two grounds. First, the statute "intrude[s]

into 'matters which the Constitution entrusts solely to the Federal Government.'" App., *infra*, 100a-105a (quoting *Zschernig* v. *Miller*, 389 U.S. 429, 436 (1968)). Second, the HVIRA violates the Foreign Commerce Clause because it "potentially prevents the federal government from speaking with one voice in its expectations of foreign insurance companies" and impermissibly "meddl[es] in foreign commerce entirely outside its borders." App., *infra*, 106a-110a.

The Commissioner appealed to the Ninth Circuit. In opposition to that appeal, the United States filed an *amicus* brief stating that the HVIRA "impairs the ability of the United States to conduct the nation's foreign policy," in violation of the Constitution's foreign affairs power. 2001 U.S. *Amicus* Br. 33-34. The U.S. government explained that "both Germany and Switzerland have protested to the State Department California's attempt to regulate the conduct of German and Swiss insurers with respect to insurance policies written in those countries." *Ibid.* It also expressed serious doubt as to the HVIRA's validity under the Commerce Clause. The government concluded that "the McCarran Ferguson Act does not shield extraterritorial [insurance] regulation" from scrutiny under the Commerce Clause, especially "where the State law has a discriminatory * * * effect in foreign countries." *Id.* at 30. The Federal Republic of Germany filed an *amicus* brief as well, stating that country's opposition to the HVIRA.

The Ninth Circuit overturned the district court's decision. Without mentioning the submissions by the United States and Germany, and dismissing the relevant international agreements as mere "executive branch initiatives," the court of appeals concluded that the HVIRA poses no conflict with U.S. foreign policy. App., *infra*, 45a-59a. The court even questioned the validity of the foreign affairs doctrine, stating that *Zschernig* "has been applied * * * sparingly" and "does not govern" (*id.* at 56a-59a). In addition, the court held as a matter of law that the McCarran-Ferguson Act shields the HVIRA from Commerce Clause scrutiny because the HVIRA "is a California

insurance regulation of California insurance companies that affects foreign commerce only indirectly." *Id.* at 45a. The court of appeals remanded for consideration of petitioners' due process claim, while leaving the injunction temporarily in place.

Petitioners sought rehearing. Again, the U.S. government and Germany filed briefs in support, this time supplemented by an *amicus* brief from Switzerland stressing the inconsistency between the HVIRA and its negotiated agreements with the United States. Nonetheless, rehearing was denied.

Petitioners then filed a certiorari petition and this Court called for the views of the Solicitor General. 122 S. Ct. 29 (2001). Before the government filed its brief, the district court entered a permanent injunction on other grounds, and petitioners withdrew their petition.

E. The District Court's Permanent Injunction And Reversal By the Ninth Circuit.

On remand, petitioners argued that the HVIRA violates due process and presented evidence that it is impossible for California insurers to obtain all the information required under the HVIRA and that, even if they could, such disclosure would violate European disclosure laws. App., *infra*, 72a, 80a. The district court held that the HVIRA does not exceed California's legislative jurisdiction under the Due Process Clause. App., *infra*, 74a. The court concluded, however, that by mandating license suspension for non-performance of impossible tasks, the HVIRA deprives petitioners of a protected property interest without due process of law. Accordingly, it permanently enjoined enforcement of the statute. *Id.* at 75a-83a.

On appeal, the United States and Germany again filed briefs in support of petitioners. The Ninth Circuit again reversed, holding that the HVIRA does not violate due process. The court of appeals agreed with the district court's legislative jurisdiction ruling, purporting to distinguish the intervening contrary

decision of the Eleventh Circuit in *Gerling*. App., *infra*, 8a-20a. The court of appeals reversed the district court's decision on substantive and procedural due process. Finally, the Ninth Circuit affirmed its prior decision on petitioners' foreign affairs and Commerce Clause claims, concluding: "[w]e are not persuaded that we erred." *Id.* at 29a.

On petition for rehearing, the United States once more informed the court of appeals that the HVIRA implicates "significant foreign policy concerns" involving close allies of the United States and that the statute constitutes "not merely a theoretical, but an actual interference with the United States' conduct of foreign policy, that undermines the Constitution's exclusive grant to the national government of authority to conduct foreign policy." 2002 U.S. *En Banc Amicus* Brief at 1, 15. Rehearing was denied.

REASONS FOR GRANTING THE PETITION

The Ninth Circuit has decided three questions contrary to decisions of this Court and in conflict with decisions of other courts of appeals. In so ruling, the court has authorized state interference with American foreign policy on the important subject of Holocaust-era insurance claims and has undermined the authority of the President to conduct the foreign relations of the United States. Review by this Court is essential.

I. THE NINTH CIRCUIT ERRED IN REFUSING TO APPLY THE FOREIGN AFFAIRS DOCTRINE TO A STATE STATUTE "IN DIRECT CONFLICT WITH" U.S. FOREIGN POLICY

The United States' bilateral agreements with Germany and Austria and Joint Statement with Switzerland represent the culmination of more than 50 years of diplomatic efforts to obtain compensation for victims of the Holocaust. The agreements are designed to resolve — once and for all — claims arising out of Nazi confiscations of property during World War II. Their hope of achieving an "all embracing and enduring

legal peace" rests directly on the goal of an "exclusive remedy and forum" for resolving Holocaust-era claims, including insurance claims. App, *infra*, 153a-155a.

It is difficult to overstate the conflict between the approach of the federal government and that of California. The federal solution rests on the premise that relief for *all* Holocaust-era claimants is best achieved if claims are resolved in an international forum; the California solution rests on the notion that foreign insurers may be called to account on a *piecemeal* basis in the courts of the 50 states.[2] The United States believes that European insurers should be required to pay claims only *once*, from a single fund containing a pre-determined sum; California believes that insurers may be forced to pay *twice* in undisclosed amounts solely out of their own pockets. The premise of the United States' agreements is that payment for wrongs committed overseas during a world war is a matter of exclusive *federal* concern; the premise of the HVIRA is that *states* may assert control over foreign companies that have never done business within their borders for acts committed on another continent more than 60 years ago.

In other words, just as the United States and European nations have reached closure on exclusive procedures to resolve Nazi-era insurance claims through international institutions, California seeks to impose its own solution through California insurance regulation and California litigation, rendering illusory the promise of "legal peace." The conflict with U.S. foreign policy could not be more clear.

The United States, German, and Swiss governments have strenuously objected to the HVIRA. For example, the United States has stated unequivocally that "the premise of the California legislation is in direct conflict with that of United States foreign policy." 2001 U.S. *En Banc Amicus* Br. 1. The

---

[2] This is more than an abstract concern: within days of the ruling below, several other states (including Rhode Island and New Jersey) began considering similar legislation. 2001 U.S. *En Banc Amicus* Br. 2.

statute "runs afoul" of the principle that "the nation speaks with one voice in foreign affairs" by "creating new regulatory burdens and incentives to litigation in an area that has been the subject of intense diplomatic negotiation fraught with the potential for international misunderstanding." *Id.* at 3-4.

Germany reiterated these concerns, stating that "the HVIRA threatens the fundamental principle upon which the Executive Agreement was negotiated: the objective that the Foundation would be the exclusive remedy and forum for resolution of all claims asserted against German companies arising from the Nazi era." 2001 FRG *En Banc Amicus* Br. 3-4. By design and effect, Germany has explained, "the HVIRA fosters precisely the sort of litigation that, according to the Executive Agreement, should be dismissed 'in the foreign policy interest' of the United States and Germany." *Id.* at 4.

Ignoring these official declarations, the Ninth Circuit upheld the HVIRA against a challenge under the foreign affairs doctrine. That ruling conflicts with this Court's decisions and with fundamental structural principles of our Constitution.

A. The Decision Is In Direct Conflict With *Zschernig*.

1. The Constitution does not permit an individual state to fashion its own solution to an international problem, to the detriment of the federal government's ability to implement a comprehensive resolution. In a series of cases beginning with *Chy Lung* v. *Freeman*, 92 U.S. 275 (1875), cited recently in *Crosby* v. *National Foreign Trade Council*, 530 U.S. 363, 381-382 n.16 (2000), this Court has declared that authority over foreign affairs belongs *solely* to the federal government. See, *e.g.*, *United States* v. *Pink*, 315 U.S. 203, 233 ("Power over external affairs is not shared by the States"). In the leading case, *Zschernig* v. *Miller*, 389 U.S. 429, 434-435 (1968), the Court held that state statutes having "more than some incidental or indirect effect in foreign countries," or having "great potential for disruption or embarrassment" of U.S. foreign policy, are unconstitutional.

This is an *a fortiori* case under *Zschernig*. There, the Court addressed the validity of a state probate law that blocked the distribution of an estate to a foreign heir if the property was subject to confiscation by foreign officials. No international negotiations or federal statutes bore on the subject; the law involved an area "traditionally regulated" by the states; and the United States government denied that it "interfere[d] with [its] conduct of foreign relations." 389 U.S. at 434. This Court nonetheless struck down the state statute. Noting that application of the statute would require "inquiries concerning the actual administration of foreign law [and] into the credibility of foreign diplomatic statements," the Court reasoned that this "intrusion by the State into the field of foreign affairs" threatened to "adversely affect the power of the central government to deal with those problems [of foreign relations]." *Id.* at 432, 441.

The conflict with foreign policy here is far more direct. The stated goal of the HVIRA is to affect international policy — to "encourage the development of a resolution to these [insurance claim] issues through the international process or through direct action by the State of California, as necessary." Cal. Ins. Code § 13801(f). While this *goal* may appear to be consonant with American policy, the *means* selected by California lawmakers — imposition of onerous disclosure requirements to facilitate drawn-out litigation — are directly contrary to the premise of federal negotiations with foreign nations, which is to resolve *all* claims expeditiously under the terms of international agreements. See *Crosby*, 530 U.S. at 379-380 (noting that the Massachusetts Burma Act conflicted with federal policy despite having "a common end"). Indeed, the means selected have direct impacts overseas, because the HVIRA imposes a draconian penalty on any California insurer whose European affiliates fail to take action on European contracts with European citizens — to the point of requiring such companies to violate foreign privacy laws. See, *e.g.*, ER 1123-1126.

Thus, the HVIRA has "more than some incidental or indirect effect in foreign countries" and presents "great potential" — indeed, actuality — "for disruption or embarrassment" of American foreign policy. *Zschernig*, 389 U.S. at 434-435. The United States has declared that the HVIRA constitutes an "actual interference" with American foreign policy. 2002 U.S. *En Banc Amicus* Br. 15.

2. The Ninth Circuit did not seriously dispute this. Rather than explain why the views of the United States and foreign governments regarding the foreign policy implications of the HVIRA should be disregarded, the court of appeals simply ignored them. Instead, it questioned *Zschernig*'s current vitality. Pointing out that the foreign affairs doctrine "is rarely invoked by the courts; the Supreme Court has not applied it in more than 30 years," the Ninth Circuit reasoned that "[b]ecause *Zschernig* has been applied so sparingly," it should "hesitate to apply [it]" to this case. App., *infra*, 59a. Putting aside the fact that it is not the place of lower courts to disregard governing precedent — whether "sparingly" applied or not (*Agostini* v. *Felton*, 521 U.S. 203, 237 (1997)) — the court of appeals failed to notice that this Court cited the foreign affairs doctrine with approval in *Crosby*, 530 U.S. at 381-382 n.16.

For the Ninth Circuit to rule that states have authority to pass laws interfering with the conduct of U.S. foreign policy is an astounding proposition, demanding review by this Court. It is precisely this state of affairs that the national Union was created to prevent and that this Court's foreign affairs doctrine is designed to address. As Alexander Hamilton observed: "No nation acquainted with the nature of our political association would be unwise enough to enter into stipulations with the United States, * * * while they were apprised that the engagements on the part of the Union might at any moment be violated by its members." THE FEDERALIST NO. 22, at 144.

3. Beyond its disparagement of the continued authority of *Zschernig*, the Ninth Circuit offered four points that supposedly

distinguished that case. *First*, it noted that here "[n]o Plaintiff is a foreign government." App., *infra*, 58a. But that does not distinguish this case from earlier foreign affairs cases. *Chy Lung* involved insulting treatment of Chinese nationals in the United States; *Zschernig* involved the rights of individuals in Communist countries to inherit property in Oregon; neither involved a foreign government. "Experience has shown that international controversies of the gravest moment, sometimes even leading to war, may arise from real or imagined wrongs to another's subjects inflicted or permitted by a government." *Zschernig*, 389 U.S. at 441. The President must be able to negotiate with respect to foreign subjects as well as foreign nations.

In addition, by regulating foreign insurers, the HVIRA is usurping foreign regulatory authority, which foreign nations certainly regard as affecting their "sovereign interest." 2001 FRG *Amicus* Br. 1. As Germany has explained (*id.* at 1-5), the HVIRA plainly seeks to force action by German insurers, by threatening to suspend the licenses of their California affiliates. Moreover, the information demanded by the HVIRA cannot be produced without violating German law, which imposes criminal penalties for unauthorized disclosure. *Ibid.*

Second, the court below noted that the "HVIRA does not refer to any particular country." App., *infra*, 58a. But neither did the law in *Zschernig*. In any event, the HVIRA on its face is directed toward specific European countries and reflects a judgment that the judicial process and regulatory authority of those countries — notably Germany — cannot be trusted.

Third, the court below stated (App., *infra*, 58a) that "there is no evidence that HVIRA would be applied in a way that would implicate the diplomatic [matters] mentioned in *Zschernig*." This statement is inexplicable. If *amicus* briefs by the United States and foreign governments and formal protests by federal officials to the Governor and the Insurance Commissioner do not constitute such evidence, it is hard to imagine

what would. This is precisely the sort of evidence on which the Court relied in *Crosby* to substantiate the "threat to the President's power to speak and bargain effectively with other nations." 530 U.S. at 382.

Fourth, the court below noted that this is a facial challenge and *Zschernig* was not. But *Zschernig* involved a law that, on its face, did not engage in extraterritorial regulation or pass judgment on foreign affairs. Only in light of its application by Oregon courts was the statute revealed as violating the foreign affairs power. 389 U.S. at 433. Here, the very purpose of the HVIRA is to interfere with the international means for resolving Holocaust-era claims, and it is having that effect in practice. *Zschernig*'s emphasis on the "potential" for disruption of U.S. foreign policy confirms that there is no need for case-by-case proof of actual effects.

These attempts to distinguish *Zschernig* are so far off the mark that they are tantamount to a refusal to follow directly controlling Supreme Court precedent. That alone is sufficient basis for a grant of certiorari.

B. The Decision Conflicts With The First Circuit's Decision In *Natsios*.

In addition to conflicting with this Court's decision in *Zschernig*, the decision below conflicts with the First Circuit's decision in *National Foreign Trade Council* v. *Natsios*, 181 F.3d 38 (1st Cir. 1999). There, the court held unconstitutional under the foreign affairs doctrine a Massachusetts law banning state business transactions with companies that do business in Burma. This Court granted certiorari and affirmed on preemption grounds, but it did not disagree with the First Circuit's foreign affairs doctrine analysis.

The decision below conflicts with *Natsios* in two important respects. First, and most significantly, the First Circuit rejected the argument that *Zschernig* "is a weak precedent" (181 F.3d at 52) and did not "hesitate" to apply it. Second, the First Circuit

rejected the grounds for distinction relied on by the Ninth Circuit. *Natsios*, like this case, involved a statute that was directed against private companies; *Natsios*, like this case, involved a facial challenge; and in *Natsios*, as in this case, the fact that the effect on foreign affairs was more than "incidental or indirect" was demonstrated by examining the purpose and effect of the law and protests from the State Department and other nations. While no two foreign affairs cases are likely to be identical, the conflict between these two decisions is substantial and warrants this Court's review.

C. The Decision Interferes With U.S. Foreign Policy In An Area Of Vital International Concern.

Even in the absence of these conflicts, the singular importance of this matter — "actual interference" with U.S. foreign policy on Holocaust issues, 2002 U.S. *En Banc Amicus* Br. 15 — would warrant this Court's attention. The Court recently has referred twice to the pressing need to resolve legal issues with an impact on American foreign policy. See *JPMorgan Chase Bank* v. *Traffic Stream (BVI) Infrastructure Ltd.*, 122 S. Ct. 2054, 2057 (2002); *Christopher* v. *Harbury*, 122 S. Ct. 2179, 2185 (2002). That is especially true where the Executive has negotiated an international agreement and its effectuation depends on court action. In *Dames & Moore* v. *Regan*, 453 U.S. 654, 668 (1981), for example, the Court granted certiorari before judgment in the court of appeals to determine the legality of an Executive Agreement reached with Iran to resolve the Iranian hostage situation. The effectuation of prompt relief for Holocaust survivors is likewise of "imperative public importance." *Id.* at 667. See also *Verlinden B.V.* v. *Central Bank of Nigeria*, 461 U.S. 480, 493 (1983) ("the primacy of federal concerns is evident" in cases "rais[ing] sensitive issues concerning the foreign relations of the United States") (citing *Zschernig*).

This Court has not hesitated to grant certiorari to resolve issues with a similar impact on foreign policy. See *Weinberger*

v. *Rossi*, 456 U.S. 25 (1982); *Alfred Dunhill of London, Inc.* v. *Republic of Cuba*, 425 U.S. 682, 689-690 (1976); *First National City Bank* v. *Banco Nacional of Cuba*, 406 U.S. 759, 761-762 (1972); *Banco Nacional de Cuba* v. *Sabbatino*, 376 U.S. 398, 407 (1964); *Regan* v. *Wald*, 468 U.S. 222 (1984). Until the decision below is reviewed and reversed, there will be a cloud over the ability of the President to negotiate with foreign nations to achieve diplomatic solutions. If states are free to undermine international agreements, other countries will be reluctant to enter into them.

II. THE NINTH CIRCUIT FAILED TO APPLY THIS COURT'S DUE PROCESS PRECEDENTS AND CREATED A CONFLICT WITH THE ELEVENTH CIRCUIT'S DECISION IN *GERLING*

1. The HVIRA also cannot survive scrutiny under the Due Process Clause, which precludes California from applying its "substantive law to factual and legal situations with which it has little or no contact." *McCluney* v. *Jos. Schlitz Brewing Co.*, 649 F.2d 578, 580 (8th Cir.), aff'd, 454 U.S. 1071 (1981). Accord, *e.g.*, *Phillips Petroleum Co.* v. *Shutts*, 472 U.S. 797, 819-822 (1985); *Home Ins. Co.* v. *Dick*, 281 U.S. 397, 407-408 (1930). This Court's decisions on legislative jurisdiction "stand for the proposition that if a State has only an insignificant contact with the parties and the occurrence or transaction, application of its law is unconstitutional." *Allstate Ins. Co.* v. *Hague*, 449 U.S. 302, 310-311 (1981) (plurality opinion).

The Eleventh Circuit in *Gerling* applied these due process principles to invalidate Florida's Holocaust Victims Insurance Act. The Florida statute, just like the HVIRA, imposed extensive reporting requirements on Florida affiliates of European insurers that issued policies in Europe during the Holocaust in order to create an insurance registry that would assist in the collection of Holocaust-era insurance proceeds through litigation. The Eleventh Circuit held that the statute exceeded Florida's legislative jurisdiction (267 F.3d at 1238):

> The subject of the * * * Act is Holocaust-era insurance policies and the payment of claims still due under those policies. While there may be a connection between the State of Florida and that subject to the extent it relates directly to the activities of Florida insurers, there is virtually *no* connection between the State of Florida and that subject to the extent it concerns insurance transactions involving Plaintiffs' German affiliates that took place years ago in Germany, among German residents, under German law, relating to persons, property, and events in Germany.

This case is indistinguishable from *Gerling*. California, like Florida, lacks sufficient contacts with the transactions and parties subject to the HVIRA to sustain its assertion of legislative jurisdiction. The entire purpose of the Act is to use the fortuity of a company's license in California as a lever to compel action by *European* insurers relating to *European* insurance transactions. It is undisputed that each and every policy that gives rise to a reporting obligation under California law was issued in Europe, to European citizens, by European insurers, and that any losses under those policies occurred in Europe and were suffered by European parties. The enormous burden of complying with the HVIRA thus falls on European (not California) insurers. The only nexus that California could possibly claim is the fact that — decades after the events in question — a small number of Holocaust survivors (or their heirs) moved to California. See § 13801(d). But this Court has held that a party's post-transaction change of residence does not justify a forum state's exercise of legislative jurisdiction over a foreign transaction. *Shutts*, 472 U.S. at 820.

2. The Ninth Circuit refused to follow *Gerling*, offering three purported distinctions. *First*, "Florida's insurance commissioner issued subpoenas addressed to Florida-licensed insurers *and their foreign affiliates*." App., *infra*, 10a n.3. But the subpoenas in that case were enforceable only against Florida-licensed insurers (not their foreign affiliates) by suspension of their licenses and, as here, only locally-licensed

insurers were parties to the case and challenged the statute. Moreover, the California Insurance Commissioner in this case (like his counterpart in Florida) demanded direct access to the California-licensed insurers' foreign affiliates and their records. ER 1111-1115.

Second, the Ninth Circuit asserted that the Eleventh Circuit "held that the sole purpose of the Florida statute was the payment of Holocaust-era claims," whereas the HVIRA has other purposes. App., *infra*, 10a. This is not true. As in *Gerling*, 267 F.3d at 1230, the only *explicit* purpose of the HVIRA (see § 13801), which the Ninth Circuit previously acknowledged (App., *infra*, 44a), is the identification and facilitation of payment of Holocaust-era insurance claims. Like the Commissioner here, the Florida Insurance Commissioner in *Gerling* argued that the real purpose of the Florida statutory "reporting provisions" was "to regulate Florida insurers, as opposed to their European affiliates," and that these provisions were "necessary to confirm the claims payment practices, solvency and 'good character' of the Florida insurer." 267 F.3d at 1238-1239.The only difference is that, unlike the Ninth Circuit, the Eleventh Circuit *rejected* these arguments (*id.* at 1239-1240):

> The Commissioner's position * * * cannot be squared with the Legislature's own unequivocal statement of its purpose. The sole express purpose of the Holocaust Victims Insurance Act does not demonstrate a concern with the good character, solvency, or present payment practices of Florida insurers; indeed, the Legislature's inclusion of the claims recovery provisions in the same statute *itself* belies any suggestion that the reporting provisions are really intended to protect ordinary policyholders * * *.

As the United States recognized in its briefs below, "[t]he explicit purpose of the [HVIRA] is not to regulate the operations of insurance companies in California, but to facilitate recovery on claims regarding Holocaust-era insurance policies issued abroad." 2001 U.S. *En Banc Amicus* Br. 8.

Third, the Ninth Circuit focused on the fact that Florida included its reporting provisions and claims-payment provisions in the same statute. App., *infra*, 10a-11a. This purported distinction is baseless. California enacted the reporting statute and claims-payment provisions in the same bill (AB 600).

At the end of the day, the Ninth Circuit was unable to distinguish *Gerling* and simply expressed disagreement with the Eleventh Circuit's "interpretation of the legislative jurisdiction doctrine." App., *infra*, 11a. It thus acknowledged an important circuit conflict.

3. The court of appeals also attempted to avoid application of the legislative jurisdiction doctrine by characterizing the HVIRA as "nothing more" than a reporting statute that "seek[s] information from California licensed insurers. Therefore, the Commissioner need not prove that minimum contacts exist." App., *infra*, 20a

But disclosure regulation is not exempt from due process principles applicable to legislative jurisdiction. No one would suggest, for example, that requiring issuers of securities to "report" detailed information on their business operations is not a form of "regulation." Requiring political candidates to report contributions is surely "regulation." Disclosure of extensive information about foreign insurance policies is no less of a regulatory burden than any of the other reporting obligations that the federal and state governments impose on their citizens. Indeed, it is more onerous given the voluminous nature of the materials sought from a time period 50 to 80 years ago and the threatened infringement of European privacy laws. As the Ninth Circuit itself recognized, "[s]eeking information from insurers about their claims-paying record, to be used in the licensing process, is a form of regulating the business of insurance." App., *infra*, 45a n.3.

In short, the Ninth Circuit has held that states (through their power over insurance companies doing business within their borders) have authority to regulate the business of insurance in

Europe, with respect to policies issued by European companies to European policyholders. In so holding, it has evaded the force of this Court's precedents and created a square conflict with the Eleventh Circuit. Due process limits on legislative jurisdiction carry special force in the international context, where the sovereign interests of other nations are implicated. See *Asahi Metal Indus. Co.* v. *Superior Court*, 480 U.S. 102, 116 (1987) (due process limits on state legislative jurisdiction require "[g]reat care and reserve" in "the international context," where "[t]he procedural and substantive policies of other nations * * * are affected"). This case plainly warrants review.

III. THE NINTH CIRCUIT'S INTERPRETATION OF THE McCARRAN-FERGUSON ACT CONFLICTS WITH THIS COURT'S HOLDINGS AND ENCOURAGES STATE INTERFERENCE WITH FOREIGN COMMERCE

The court of appeals also went fatally astray in its treatment of the Foreign Commerce Clause. The Ninth Circuit's holding that the McCarran-Ferguson Act, 15 U.S.C. §§ 1011-1015, shields California's regulation of the *overseas* activities of insurance companies from the reach of the Clause is flatly inconsistent with a controlling decision of this Court and creates grave uncertainty about the scope of an oft-cited federal statute that has great practical importance. Because the court of appeals made this error in a foreign commercial setting that "is pre-eminently a matter of national concern" and where "[t]he need for federal uniformity is * * * paramount" (*Japan Line, Ltd.* v. *County of Los Angeles*, 441 U.S. 434, 448, 449 (1979)), review by this Court is essential.

A. The HVIRA Violates The Foreign Commerce Clause.

Petitioners and the United States argued below, and the district court held, that the HVIRA is unconstitutional under the Foreign Commerce Clause both because the statute has an impermissible extraterritorial effect and because it causes disruption in an area where a uniform national approach is

necessary. App., *infra*, 106a-110a. As the United States explained, the HVIRA runs afoul of the Clause by imposing regulatory requirements on insurance policies that "have no nexus with California," by "subject[ing] insurance corporations to conflicting legal obligations," by engaging in "extraterritorial regulation," and by imposing burdens on international commerce "that diverge from the foreign policy interests of the nation." 2001 U.S. *Amicus* Br. 18, 19, 21, 24-25. The Clause bars that sort of state interference with foreign commerce because it may foment "international disputes" and lead other nations to "retaliate against American-owned instrumentalities present in their jurisdictions." *Japan Line*, 441 U.S. at 450.

B. The Ninth Circuit Erred In Holding That The McCarran-Ferguson Act Shields The HVIRA From Commerce Clause Scrutiny.

The Ninth Circuit did not deny that the HVIRA violates the Foreign Commerce Clause if it is applicable. Instead, it held that the Commerce Clause is rendered irrelevant by Section 2(a) of the McCarran-Ferguson Act. App., *infra*, 40a-45a.[3] That holding is indefensible. As the United States argued below, McCarran-Ferguson is inapplicable to the HVIRA because the federal statute simply "does not shield a State's attempt to regulate insurance extraterritorially." 2001 U.S. *Amicus* Br. 28.

This Court reached precisely that conclusion in *Federal Trade Comm'n* v. *Travelers Health Ass'n*, 362 U.S. 293 (1960). Construing Section 2(b) of the Act, 15 U.S.C. § 1012(b), which

---

[3] The court of appeals suggested that the U.S. Holocaust Assets Commission Act of 1998, 22 U.S.C. § 1621 note, shows that Congress "encouraged laws like HVIRA." App. *infra*, 50a. But that statute does nothing of the sort. The Act established a *federal* Commission to examine the disposition of Holocaust-era assets in the United States. The Commission issued a report *that makes no mention of state regulation.* As the United States explained (2001 U.S. *En Banc Amicus* Br. 13), the "Act contains no provision suggesting that Congress intended to authorize or endorse a state statute that compels the sort of sweeping extraterritorial disclosure California has required here * * *. In fact, the federal Act points in *the opposite* direction."

provides that specified federal laws "shall be applicable to the business of insurance to the extent that such business is not regulated by state law," the Court held in *Travelers* that the Act does not extend to *extraterritorial* regulation. See 362 U.S. at 299-302. The Court thus found it "clear that [the Act] viewed state regulation of insurance solely in terms of regulation by the law of the State where occurred the activity sought to be regulated. *There was no indication of any thought that a State could regulate activities carried on beyond its own borders.*" *Id.* at 300 (emphasis added).

That rule is dispositive here. The HVIRA has a "vast extraterritorial reach," "impos[ing] regulatory requirements on corporations that have never done business in California with respect to policies issued to foreign nationals who themselves have no connection to California." 2001 U.S. *Amicus* Br. 14, 20. Indeed, the *entire purpose* of the HVIRA is to require the compilation and disclosure of voluminous materials by foreign entities that are not themselves subject to California's jurisdiction and that in many instances have had no contact with the State at all. And the HVIRA does so even though, as the German government has explained, keeping insurance documents private is *required by* German law and unauthorized disclosure is punishable with criminal sanctions. 2001 FRG *En Banc Amicus* Br. 6.

The "practical effect of the regulation is to control conduct beyond the boundaries of the State" (*Healy* v. *Beer Institute*, 491 U.S. 324, 336 (1989)) and to "impose economic sanctions on violators of [California's own] laws with the intent of changing [the affected party's] lawful conduct in other [jurisdictions]." *BMW of North Am., Inc.* v. *Gore*, 517 U.S. 559, 572 (1996). That is the very definition of extraterritorial regulation.

C. The Ninth Circuit's Purported Distinction Of *Travelers* Is Unavailing.

The Ninth Circuit recognized that it could not uphold the HVIRA without distinguishing this Court's decision in *Travelers*. The court of appeals' effort to do so, however, deviates from this Court's unambiguous holding.

The court below reasoned that the limits on state authority to enact extraterritorial insurance regulations recognized in *Travelers* apply only in cases involving Section 2(b) of the Act, and have no bearing on cases concerning Section 2(a), 15 U.S.C. § 1012(a). See App., *infra*, 41a-45a. Section 2(b) provides that specified federal statutes "shall be applicable to the business of insurance to the extent that *such business is not regulated by state law*"; its companion paragraph, Section 2(a), provides that the business of insurance "shall be subject to the laws of the several States *which relate to the regulation * * * of such business*," protecting those state laws from attack under the Commerce Clause. In drawing a sharp distinction between the scope of these two similarly worded provisions, the court of appeals concluded that Congress in the Act (and this Court in *Travelers*) *did not* intend federal statutory law to be displaced by extraterritorial state insurance regulations, but *did* intend to set aside federal Commerce Clause requirements insofar as they apply to those same extraterritorial state regulations

This peculiar reasoning is insupportable. To begin with, as the United States explained below, the plain language of the Act makes no distinction between the body of state laws described by the Act's two subsections. "Paragraphs (a) and (b) [of Section 2 of the Act] are * * * mirror images": the specified federal laws described in Section 2(b) apply to the business of insurance "unless the insurance business at issue is already regulated by the State as contemplated by paragraph (a). There is no apparent basis for the * * * contention that the language of paragraph (b), 'regulated by State law,' means anything other than the 'laws of the * * * States which relate to the regulation * * * of [insurance],' described in paragraph (a)." 2001 U.S. *Amicus* Br. 30. This means, of course, that state laws like those held in *Travelers* to be outside the scope of Section 2(b) because they are extraterritorial also necessarily must be unprotected by Section 2(a).

The central purpose of the McCarran-Ferguson Act confirms that Congress did not intend to authorize, or to insulate from constitutional challenge, extraterritorial state insurance regulations. The Act was passed "in response to this Court's decision in *United States* v. *South-Eastern Underwriters Ass'n*, 322 U.S. 533 (1944)" (*United States Dept. of Treasury* v. *Fabe*, 508 U.S. 491, 499 (1993)), which held for the first time that insurance transactions are subject to the federal commerce power; "[t]here is no question that the primary purpose of the McCarran-Ferguson Act was to preserve state regulation of the activities of insurance companies, as it existed before the *South-Eastern Underwriters* case." *Group Life & Health Ins. Co.* v. *Royal Drug Co.*, 440 U.S. 205, 218 n.18 (1979). See *Fabe*, 508 U.S. at 499; *Travelers*, 362 U.S. at 399. For that reason, Congress made clear that it did not intend the Act "to clothe the States with any power to regulate or tax the business of insurance beyond that which they had been held to possess prior to the decision of the United States Supreme Court in the South-Eastern Underwriters Associations case." H.R. Rep. No. 142, 79th Cong., 1st Sess. 3 (1945).

Yet prior to *South-Eastern Underwriters*, this Court had held specifically and repeatedly that states do *not* have authority to regulate or tax the extraterritorial activities of insurance companies. See *Connecticut General Life Ins. Co.* v. *Johnson*, 303 U.S. 77, 81 (1938) (Stone, J.) (State lacks the "power to tax or regulate the corporation's property and activities elsewhere," even where "the corporation enjoys outside the state economic benefits from transactions within it"); *St. Louis Cotton Compress Co.* v. *Arkansas*, 260 U.S. 346, 349 (1922) (Holmes, J.) ("It is true that the State may regulate the activities of foreign [insurance] corporations within the State, but it cannot regulate or interfere with what they do outside."); *Allgeyer* v. *Louisiana*, 165 U.S. 578, 591-592 (1897) (State lacks authority to regulate where the insurance "contract [was] made outside the state," "to be performed outside of such jurisdiction"). Indeed, as the Court explained in *Travelers*, the House report on the Act

specifically cited and approved these decisions, declaring that the "'continued regulation and taxation of insurance by the States'" should be

> subject always * * * to the limitations set out in the controlling decisions of the United States Supreme Court, as, for instance, in *Allgeyer* v. *Louisiana* (165 U.S. 578), *St. Louis Cotton Compress Co.* v. *Arkansas* (260 U.S. 346), and *Connecticut General Insurance Co.* v. *Johnson* (303 U.S. 77), which hold, inter alia, that a State does not have power to tax contracts of insurance or reinsurance entered into outside its jurisdiction by individuals or corporations resident or domiciled therein covering risks within the State or to regulate such transactions in any way.

362 U.S. at 300-301 (quoting H.R. Rep. No. 142, *supra*, at 3).

The decision below cannot be squared with this clear expression of legislative intent. Congress believed that states lacked the authority to engage in extraterritorial insurance regulation, and it left no doubt that the McCarran-Ferguson Act was not intended to expand state authority in that regard.

The Ninth Circuit also attempted to distinguish *Travelers* on the ground that this Court's decision involved state laws that "sought to regulate directly the conduct of an insurer in another jurisdiction," while the HVIRA "seeks only to obtain information about conduct in another jurisdiction." App., *infra*, 41a-43a. But that distinction is chimerical. *Travelers* is expressly premised on Congress's recognition that states lack authority to assert extraterritorial control over insurance companies. That is just what California is attempting to do under the HVIRA: it is requiring foreign insurers to undertake burdensome actions overseas, on the pain of heavy penalties imposed on their California corporate relatives, even if those actions are contrary to foreign criminal law.

The Ninth Circuit reasoned that the HVIRA is protected by McCarran-Ferguson because the state law ostensibly relates to

the California licensing process and "affects foreign commerce only indirectly." App., *infra*, 45a. But under that reasoning, *no* state law ever would be thought to have an extraterritorial effect because states may act directly only on entities within their jurisdiction. Such an approach would read all limits on extraterritorial legislation out of the Act — and out of the Commerce Clause itself.

* * * * *

The Ninth Circuit's decision "reflects a serious misconstruction of governing law on questions of great and immediate importance." 2001 U.S. *En Banc Amicus* Br. 4. The decision authorizes state interference with U.S. foreign policy, undermines the authority of the President to conduct the Nation's foreign relations, invites states to apply their laws extraterritorially, conflicts with decisions of other circuits, and fails to follow this Court's precedents on three important legal questions. Review by this Court is imperative.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

STEPHEN M. SHAPIRO
Mayer, Brown, Rowe & Maw
190 South LaSalle Street
Chicago, IL 60603
(312) 782-0600

NEIL M. SOLTMAN
Mayer, Brown, Rowe & Maw
350 South Grand Avenue
Los Angeles, CA 90071
(213) 229-9500

KENNETH S. GELLER
Counsel of Record
JOHN J. SULLIVAN
Mayer, Brown, Rowe & Maw
1909 K Street, N.W.
Washington, DC 20006
(202) 263-3000

Counsel for Petitioners American Insurance Association and American Re-Insurance Company

PETER SIMSHAUSER
Skadden, Arps, Slate, Meagher & Flom LLP
300 South Grand Avenue
Los Angeles, CA 90071
(213) 687-5000

Counsel for Petitioner Assicurazioni Generali S.p.A.

WILLIAM H. WEBSTER
Milbank, Tweed, Hadley & McCloy LLP
1825 Eye Street, N.W.
Washington, DC 20006
(202) 835-7500

LINDA DAKIN-GRIMM
SALLY AGEL
Milbank, Tweed, Hadley & McCloy LLP
601 South Figueroa Street
Los Angeles, CA 90017
(213) 892-4000

Counsel for Petitioners Winterthur International America Insurance Company; Winterthur International America Underwriters Insurance Company; General Casualty Company of Wisconsin; Regent Insurance Company; Southern Insurance Company; Unigard Indemnity Company; Unigard Insurance Company; and Blue Ridge Insurance Company

NOVEMBER 2002

APPENDICES

APPENDIX A

FOR PUBLICATION

UNITED STATES COURT OF APPEALS
NINTH CIRCUIT

Nos. 01-17023, 01-17433, 02-15282
D.C. No. CV-00-00506-WBS

GERLING GLOBAL REINSURANCE CORP. OF AMERICA; GERLING GLOBAL REINSURANCE CORP. — U.S. BRANCH; GERLING GLOBAL LIFE REINSURANCE COMPANY; GERLING GLOBAL LIFE INSURANCE COMPANY; GERLING AMERICA INSURANCE COMPANY; AND CONSTITUTION INSURANCE CORP., *Plaintiffs-Appellees-Cross-Appellants-Plaintiffs-Appellants,*

v.

Harry W. LOW, in his capacity as the COMMISSIONER OF INSURANCE OF THE STATE OF CALIFORNIA,
Defendant-Appellant-Cross-Appellee-Defendant-Appellee.

D.C. No. CV-00-00875-WBS

ASSICURAZIONI GENERALI,
Plaintiff-Appellee-Cross-Appellant-Plaintiff-Appellant,

v.

Harry W. Low, individually, and in his capacity as the INSURANCE COMMISSIONER FOR THE

STATE OF CALIFORNIA, *Defendant-Appellant-Cross-Appellee-Defendant-Appellee.*

D.C. No. CV-00-00779-WBS

WINTERTHUR INTERNATIONAL AMERICA INSURANCE COMPANY, WINTERTHUR INTERNATIONAL AMERICA UNDERWRITERS INSURANCE COMPANY; GENERAL CASUALTY COMPANY OF WISCONSIN, REGENT INSURANCE COMPANY; REPUBLIC INSURANCE COMPANY; SOUTHERN INSURANCE COMPANY, UNIGARD INDEMNITY COMPANY; UNIGARD INSURANCE COMPANY; AND BLUE RIDGE INSURANCE COMPANY, *Plaintiffs-Appellees-Cross-Appellants-Plaintiffs-Appellants,*

v.

HARRY W. LOW, in his capacity as INSURANCE COMMISSIONER FOR THE STATE OF CALIFORNIA, *Defendant-Appellant-Cross-Appellee-Defendant-Appellee.*

D.C. No. CV-00-00613-WBS

AMERICAN INSURANCE ASSOCIATION AND AMERICAN RE-INSURANCE COMPANY, *Plaintiffs-Appellees-Cross-Appellants-Plaintiffs-Appellants,*

v.

HARRY W. LOW, in his capacity as INSURANCE COMMISSIONER FOR THE STATE OF CALIFORNIA, *Defendant-Appellant-Cross-Appellee-Defendant-Appellee.*

Appeals from the United States District Court
for the Eastern District of California
William B. Shubb, District Judge, Presiding

Argued and Submitted
May 8, 2002 — Pasadena, California.

Filed July 15, 2002
Amended September 9, 2002

Before: Alfred T. Goodwin, Susan P. Graber, and Richard A. Paez, Circuit Judges

---

ORDER

The opinion filed July 15, 2002, is amended as follows:

On slip opinion page 9856, line 3 from the bottom, insert ", denied the Commissioner's summary judgment motion," so the sentence reads as follows: "The court granted Plaintiffs' summary judgment motion, denied the Commissioner's summary judgment motion, and permanently enjoined the Commission from enforcing the statute."

On slip opinion page 9857, second full paragraph, replace the first sentence and citation with: "We review de novo the district court's grant or denial of summary judgment. *United States* v. *Alameda Gateway Ltd.*, 213 F.3d 1161, 1164 (9th Cir. 2000)."

On slip opinion page 9882, last two lines, replace with: "REVERSED and REMANDED with instructions to vacate the injunction and to grant the Commissioner's motion for summary judgment."

The panel has voted to deny the Plaintiffs' petitions for panel rehearing. With the above amendments, the panel has

voted to deny the Defendant's petition for panel rehearing. Judges Graber and Paez have voted to deny the Plaintiffs' petitions for rehearing en banc, and Judge Goodwin has so recommended.

The full court has been advised of the petitions for rehearing en banc and no judge of the court has requested a vote on the petitions.

The Plaintiffs' petitions for panel rehearing and petitions for rehearing en banc are DENIED. With the above amendments, the Defendant's petition for panel rehearing is DENIED.

No subsequent petitions for rehearing or rehearing en banc may be filed.

OPINION

GRABER, Circuit Judge.

This case comes before us for the second time. Plaintiffs, which are various insurance companies and a trade association of insurance companies, brought the present action to enjoin Defendant Harry W. Low, the Insurance Commissioner of the State of California (Commissioner), from enforcing a California statute requiring disclosure of information about Holocaust-era insurance policies. The district court permanently enjoined enforcement of the statute. The main question for decision is this: May California constitutionally require the disclosure of insurance claims-related information by an insurance company that is licensed to do business in California even though the required information may be in the hands of a related entity that is located in a foreign country? We answer that question "yes" and, accordingly, reverse the judgment of the district court and vacate the injunction.

FACTUAL AND PROCEDURAL HISTORY

The Holocaust Victim Insurance Relief Act of 1999, Cal. Ins. Code §§ 13800-13807 (HVIRA), requires any insurer doing business in California that sold insurance policies to persons in Europe that were in effect between the years 1920 and 1945 (Holocaust-era policies) to file certain information about those policies with the Commissioner.[1] Cal. Ins. Code § 13804(a). The reporting requirement also applies to insurance companies that do business in California and are "related" to a company that sold Holocaust-era policies, even if the relationship arose after the policies were issued. *Id.* A "related company" is defined as any "parent, subsidiary, reinsurer,[2] successor in interest, managing general agent, or affiliate company of the insurer." *Id.* § 13802(b). The statute instructs the Commissioner to store the information in a "Holocaust Era Insurance Registry," which is to be made available to the public. *Id.* § 13803. The Commissioner "shall suspend the certificate of authority to conduct insurance business in the state of any insurer that fails to comply" with the reporting requirements, until the insurer complies. *Id.* § 13806.

---

[1] The information that the insurance companies must provide is: (1) the number of Holocaust-era insurance policies; (2) the holder, beneficiary, and current status of each policy; and (3) the city of origin, domicile, or address for each policyholder listed in the policies. Cal. Ins. Code § 13804(a)(1)-(3). In addition, the insurer must certify that: (1) the proceeds of the policies were paid; or (2) the beneficiaries or heirs could not, after diligent search, be located, and the proceeds were distributed to Holocaust survivors or charities; or (3) a court of law has certified a plan for the distribution of the proceeds; or (4) the proceeds have not been distributed. The implementing regulations state that, if "the insurer states that it has no actual policies to report because the records are no longer in the possession of the insurer or its related company(ies), it shall provide a complete explanation of that statement." Cal. Code Regs. tit. 10, § 2278.2(a). Any insurer who knowingly files false information is subject to a penalty not to exceed $5,000. Cal. Ins. Code § 13805.

[2] By regulation, the meaning of "reinsurer" is limited to directly related companies. Cal. Code Regs. tit. 10, § 2278.1(i).

Plaintiffs filed four separate actions in which they sought to enjoin the enforcement of HVIRA. The original complaints were filed by

> (1) Gerling Global Reinsurance Corp. of America and its affiliates (collectively, Gerling), who are, according to their complaint, "arguably 'affiliated' [with] . . . or 'related [to]'" two German insurers that issued Holocaust-era policies; (2) American Insurance Association (AIA), a nonprofit trade association of insurers whose member-insurers are required to report under HVIRA, and American Reinsurance Company, a wholly owned subsidiary of a German corporation "that has investment interests in European insurance companies that do issue insurance policies"; (3) Winterthur International America Insurance Company, its affiliates, and numerous other insurance and underwriting companies (collectively, Winterthur), who are "arguably 'related companies' . . . with more than forty insurance companies currently located in Europe"; and (4) Assicurazioni Generali (Generali), an Italian insurance company that issued Holocaust-era policies and currently does business in California.

Gerling Global Reins. Corp. of Am. v. Low, 240 F.3d 739, 742 (9th Cir.2001) (*Gerling I*), *cert. dismissed*, --- U.S. ----, 122 S. Ct. 1907, 151 L.Ed.2d 961 (2002).

Plaintiffs sought declaratory and injunctive relief, claiming that HVIRA violated a number of constitutional provisions. Additionally, Plaintiff Gerling asked the court to review two statutes that were enacted at the same time as HVIRA: (1) California Code of Civil Procedure § 354.5, which allows California residents to bring claims for the payment of Holocaust-era insurance policies and extends the statute of limitations on such claims until December 31, 2010; and (2) California Insurance Code § 790.15, which instructs the Commissioner to suspend the certificate of authority of any insurer who has failed to pay on valid Holocaust-era policies.

The Commissioner, in his motion to dismiss, argued that Gerling did not have standing to challenge these two additional statutes. The district court granted the motion to dismiss the additional challenges because Gerling had not established an imminent threat of prosecution. Gerling did not appeal that ruling. *Gerling I*, 240 F.3d at 742-43.

The district court issued an order granting Plaintiffs' motions for preliminary injunction and enjoined enforcement of HVIRA and its implementing regulations pending the entry of final judgments. The court based its preliminary injunction on a determination that Plaintiffs had established that (1) they probably would succeed under the foreign affairs doctrine and the Commerce Clause, and (2) enforcement of the statute would cause Plaintiffs irreparable harm. The district court did not reach Plaintiffs' other constitutional challenges to the statute.

The Commissioner appealed the district court's decision. We rejected Plaintiffs' Commerce Clause and foreign affairs doctrine challenges to the statute as a matter of law. *Id.* at 743, 751. However, we left the preliminary injunction in place "in order to give the district court an opportunity to consider whether Plaintiffs are likely to succeed on the merits" of their due process claims. *Id.* at 754.

On remand, the district court conducted further proceedings and ultimately held that the statute violates Plaintiffs' right to procedural due process by "mandating license suspension for non-performance of what may be impossible tasks without allowing for a meaningful hearing." *Gerling Global Reins. Corp. of Am. v. Low*, 186 F. Supp.2d 1099, 1113 (E.D. Cal. 2001) (*Gerling II*). The court granted Plaintiffs' summary judgment motion, denied the Commissioner's summary judgment motion, and permanently enjoined the Commissioner from enforcing the statute. *Id.* The Commissioner filed a timely notice of appeal. Plaintiffs timely cross-appealed the district court's denial of their alternative grounds for summary judgment.

Plaintiffs moved for a determination that they were entitled to attorney fees as prevailing parties under 42 U.S.C. §§ 1983, 1988. The district court denied their motion, and Plaintiffs timely appealed that decision as well.

STANDARD OF REVIEW

We review de novo the district court's grant or denial of summary judgment. *United States v. Alameda Gateway Ltd.*, 213 F.3d 1161, 1164 (9th Cir.2000). Viewing the evidence in the light most favorable to the non-moving party, we must determine whether there are any genuine issues of material fact and whether the district court properly applied the relevant substantive law. *Id.* We also review de novo the constitutionality of a statute. *Dittman v. California*, 191 F.3d 1020, 1024-25 (9th Cir.1999).

LEGISLATIVE JURISDICTION

Key to Plaintiffs' position in this appeal is the assertion that the California legislature exceeded its legislative authority and, by doing so, violated Plaintiffs' due process rights. Specifically, Plaintiffs argue that HVIRA regulates extraterritorially, that is, imposes requirements on entities that are located outside California's borders and alters the substance of insurance contracts executed outside the state. We are not persuaded.

We begin from the premise that a state legislature possesses nearly plenary power to regulate state-licensed businesses and to seek information from entities that are licensed to do business within that state. "The wisdom of [a licensing disclosure] requirement is not for us to judge. For in the end, 'it is for the legislature, not the courts, to balance the advantages and disadvantages of . . . new requirement[s].'" *Dittman*, 191 F.3d at 1032 (quoting *Williamson v. Lee Optical of Okla., Inc.*, 348 U.S. 483, 487-88, 75 S. Ct. 461, 99 L.Ed. 563 (1955)) (second alteration in original). Further, we "will not presume that information sought by state officials for which

there is a legitimate purpose will be put to an unconstitutional use." *Lewis v. Younger*, 653 F.2d 1258, 1260 (9th Cir.1980).

We next emphasize what HVIRA does and does not do. We already have cautioned that Plaintiffs' argument that HVIRA "attempts to regulate the decision making authority of European insurance companies to pay or not to pay claims on European policies . . . mischaracterizes HVIRA as a matter of law." *Gerling I*, 240 F.3d at 745 (internal quotation marks omitted). We have explained that HVIRA is a reporting statute which, "by its terms, does not regulate 'the decision making authority of European insurance companies to pay or not to pay claims on European policies' in any way." *Id.* (internal quotation marks omitted). Further, we have held that the statute "is a California insurance regulation of California insurance companies" that "requires California companies only to *provide information* about Holocaust-era insurance policies that they (or any of their affiliates) issued." *Id.* at 746, 745; *see id.* at 745 (distinguishing HVIRA from "state laws [that] sought to regulate directly the conduct of an insurer in another jurisdiction. By contrast, HVIRA seeks only to obtain information about conduct in another jurisdiction, without affecting directly any of that conduct").

Plaintiffs rely heavily on *Gerling Global Reinsurance Corp. of America v. Gallagher*, 267 F.3d 1228 (11th Cir. 2001), in which the Eleventh Circuit held that a Florida statute similar to HVIRA violated due process because it was enacted in excess of the state's legislative jurisdiction. We find that case uninstructive in analyzing the reach of HVIRA, for two reasons.

First, *Gallagher* is materially distinguishable. In *Gallagher*, information was demanded directly from both local and foreign

entities,[3] while here information is sought only from the California licensees.

Further, the *Gallagher* court held that the sole purpose of the Florida statute was the payment of Holocaust-era claims and that no other justification for the statute, such as the Florida licensees' fitness to do business, had been properly advanced. *Id.* at 1239-40. By contrast, we construe HVIRA to have several legitimate purposes.[4]

Additionally, as we have noted, the only statute at issue in this appeal is a reporting statute. Proposed challenges to other laws that alter the statute of limitations and provide a forum for substantive claims were dismissed for lack of standing. By

---

[3] Florida's insurance commissioner issued subpoenas addressed to Florida-licensed insurers and their foreign affiliates, demanding disclosure of a wide range of documents. *Gallagher*, 267 F.3d at 1231.

[4] The Eleventh Circuit acknowledged the importance to its analysis of the Florida statute's purpose:

> We do not mean to say that the Commissioner is necessarily without authority to investigate and obtain records regarding the practices of affiliates of Florida insurers. On the contrary, separate provisions of the Florida Insurance Code may well give the Commissioner authority to conduct far-reaching inquiries into the affairs of a Florida insurer's affiliates in order to determine whether the Florida insurer is fit to do business in the state . . . .
>
> We offer no view as to whether these provisions (which the Commissioner does not even invoke) might have authorized the subpoenas served by the Commissioner in this case; nor do we offer any view regarding the constitutionality of invoking those provisions in this context. Certainly these provisions fit more closely with the purpose now asserted by the Commissioner, and that fact may well affect the Due Process analysis. But the critical point is that these subpoenas were issued in furtherance of an investigation under the Holocaust Victims Insurance Act, and that Act is not concerned with the financial stability or fitness of insurers doing business in Florida . . . .

Gallagher, 267 F.3d at 1240.

contrast, the statute considered in *Gallagher* contained both disclosure and substantive elements. *See id.* at 1229, 1239. Although the Eleventh Circuit based its ruling on only the disclosure provisions, *id.* at 1234, the difference in the structure of the two statutes still is meaningful. The California legislature already made the policy judgment that the reporting requirement is severable and has independent force. Thus we need not guess whether the reporting requirement is merely ancillary to substantive regulations directly affecting out-of-state entities and transactions. *Cf. id.* at 1239 ("[T]he Legislature's inclusion of the claims recovery provisions in the same statute *itself* belies any suggestion that the reporting provisions are really intended to protect ordinary policyholders by monitoring the exposure and financial sufficiency of Florida insurers.").

The second reason why we decline to adopt the reasoning of *Gallagher* is that it offers an interpretation of the legislative jurisdiction doctrine that conflicts with the relevant precedents, at least insofar as a statute like HVIRA is concerned. The legislative jurisdiction cases appear to fall into three different categories, each proscribing a certain type of legislative enactment, and HVIRA falls into none of them. We will discuss these three categories in turn.

A. *Regulation of Out-of-State Entities on the Basis of Incidental In-State Contacts*

Several cases have held that the legislative jurisdiction doctrine bars states from directly regulating out-of-state entities unless those entities and their regulated activities have minimum contacts with the state. The analysis in these cases often parallels the analysis of whether the state would have personal jurisdiction over a party in the context of a judicial proceeding.

Thus, for instance, in *Adventure Communications, Inc. v. Kentucky Registry of Election Finance*, 191 F.3d 429, 432 (4th Cir. 1999), the Fourth Circuit applied the legislative jurisdiction

doctrine to a Kentucky statute regulating out-of-state television and radio broadcasters who sold advertising time to Kentucky gubernatorial candidates. Finding that the requisite minimum contacts existed between the state, the broadcasters, and their campaign- advertising practices, the court held that Kentucky's statute did not violate due process. *Id.* at 437-38.

Similarly, in *American Charities for Reasonable Fundraising Regulation, Inc. v. Pinellas County*, 221 F.3d 1211, 1213 (11th Cir.2000) (per curiam), the Eleventh Circuit applied the legislative jurisdiction doctrine to a county ordinance requiring persons, wherever located, who solicited charitable contributions within the county to register with the county before performing services for their clients. The ordinance also placed limitations on the ability of outside solicitors and consultants to raise funds in the county for organizations that had not themselves registered. *Id.* The court, finding that it had insufficient facts with which to perform the "minimum contacts" analysis, remanded the case to the district court for further development of the record. *Id.* at 1215-16.

Finally, in *Quill Corp. v. North Dakota*, 504 U.S. 298, 301-02, 112 S.Ct. 1904, 119 L.Ed.2d 91 (1992), the Supreme Court considered the validity of a use tax imposed by North Dakota on out-of-state mail-order vendors who sold goods to North Dakota residents for consumption within the state. The Court found that the requisite minimum contacts existed between the state and the regulated vendors, so that the statute did not exceed North Dakota's legislative jurisdiction. *Id.* at 308, 112 S.Ct. 1904.

As we have explained previously, HVIRA cannot properly be regarded as a statute that directly regulates foreign insurance companies. Although Plaintiffs complain that the practical effect of the statute is to force foreign companies to search through their records and compile the requested information, this characterization ignores a number of relevant facts. HVIRA places no *direct* demands on these foreign entities and does not

impose any sanctions on *them* for noncompliance.[5] Thus, both the demands and the sanctions of the statute fall solely on California insurers. Should the foreign company desire not to help a California affiliate comply with HVIRA, it need not do so. In fact, Plaintiffs themselves highlight this feature of the statute when they argue that they cannot comply due to their lack of "control" over the requested information.

Additionally, California insurers can comply with the statute even in the absence of assistance from foreign affiliates, in at least two ways: The California insurer's employees could travel overseas to examine the documents themselves, or the California insurer could disaffiliate and thus shed any reporting requirement. Either way, foreign insurers would bear no burden resulting from their affiliates' compliance with HVIRA.

In summary, the statutes at issue in *Adventure Communications, American Charities*, and *Quill Corp.* are distinguishable from HVIRA because they directly regulated out-of-state businesses. By contrast, HVIRA directly regulates the behavior of only California insurers.

B. *Regulation of the Substance of Out-of-State Transactions*

A second line of cases addresses the extent to which a state may regulate, and thereby alter, the *substance* of a transaction executed outside the state and having few in-state

---

[5] The Gerling and Winterthur Plaintiffs point to letters sent by the California State Treasurer to Plaintiffs' foreign affiliates, urging the companies to help their California affiliates comply with HVIRA. However, these letters were requests, not demands, and carried with them no threat of direct sanctions. Foreign affiliates were and are free to ignore these entreaties. Accordingly, these letters cannot be characterized as a form of direct regulation imposed on foreign insurers.

Moreover, even if these letters were improper, they do not make the statute unconstitutional on its face. HVIRA places no demands directly on foreign insurers; if the Commissioner or other state officials erroneously do so, they do not alter the statute.

consequences. These cases proceed from an analogy based on the "choice-of-law" principle, that is, whether a state has sufficient contacts with the parties and the transaction to apply its substantive law to affect the nature of the transaction. *See, e.g., Allstate Ins. Co. v. Hague*, 449 U.S. 302, 308, 101 S. Ct. 633, 66 L.Ed.2d 521 (1981).

Thus, in *Home Insurance Co. v. Dick*, 281 U.S. 397, 403-04, 50 S.Ct. 338, 74 L.Ed. 926 (1930), the Supreme Court considered whether a Texas insurance statute could apply in the context of litigation over an insurance policy that had been issued in Mexico, by a Mexican insurer, to a Mexican citizen, covering losses occurring in Mexican waters. The statute, had it applied, would have invalidated an essential substantive term in the insurance policy that was legal in Mexico. *Id.* at 404-05, 50 S.Ct. 338; *id.* at 407, 50 S.Ct. 338 ("As construed, it also directs the disregard in Texas of contractual rights and obligations wherever created and assumed; and it commands the enforcement of obligations in excess of those contracted for."). The Court held that the statute, as applied, violated due process because there were insufficient contacts between Texas and the insurance policy that the statute served to alter: "Texas was therefore without power to affect the terms of contracts so made. Its attempt to impose a greater obligation than that agreed upon and to seize property in payment of the imposed obligation violates the guaranty against deprivation of property without due process of law." *Id.* at 408, 50 S.Ct. 338.

Similarly, in *Watson v. Employers Liability Assurance Corp.*, 348 U.S. 66, 67-70, 75 S.Ct. 166, 99 L.Ed. 74 (1954), the Supreme Court applied the legislative jurisdiction doctrine to a Louisiana insurance statute that purported to void certain provisions in insurance contracts entered into outside Louisiana. Likewise, in *Hartford Accident & Indemnity Co. v. Delta & Pine Land Co.*, 292 U.S. 143, 149, 54 S.Ct. 634, 78 L.Ed. 1178 (1934), the Court refused to enforce a Mississippi statute that altered the terms of an out-of-state contract for a fidelity bond. The Court held:

> The Mississippi statutes, so construed, deprive the appellant of due process of law. A state may limit or prohibit the making of certain contracts within its own territory; but it cannot extend the effect of its laws beyond its borders so as to destroy or impair the right of citizens of other states to make a contract not operative within its jurisdiction, and lawful where made. Nor may it in an action based upon such a contract enlarge the obligations of the parties to accord with every local statutory policy solely upon the ground that one of the parties is its own citizen.
>
> . . . A legislative policy which attempts to draw to the state of the forum control over the obligations of contracts elsewhere validly consummated and to convert them for all purposes into contracts of the forum regardless of the relative importance of the interests of the forum as contrasted with those created at the place of the contract, conflicts with the guaranties of the Fourteenth Amendment.

Id. at 149-50, 54 S.Ct. 634 (citations omitted).

More recently, in *Phillips Petroleum Co. v. Shutts*, 472 U.S. 797, 799, 105 S.Ct. 2965, 86 L.Ed.2d 628 (1985), the Supreme Court examined whether a Kansas court could apply Kansas law to a class action involving plaintiffs from all 50 states who were seeking to recover royalty payments with respect to lands leased by Phillips Petroleum in 11 states. Highlighting the substantive differences between the laws of Kansas and the laws of the states where the lands were leased, the Court held that Kansas lacked sufficient contacts with the out-of-state transactions to apply Kansas law. *Id.* at 816-17, 821, 105 S.Ct. 2965.

HVIRA's reporting provisions do not seek to regulate the substance of out-of-state transactions. The statute does not require insurers to pay any claims or otherwise alter the terms

of Holocaust-era insurance policies.[6] To the contrary, HVIRA requires California insurers *only to disclose information about* their foreign transactions or those of their affiliates. A request for information is simply not equivalent to a direct regulation of out-of-state transactions. Thus, cases such as *Hague, Dick, Watson, Hartford,* and *Phillips* are inapposite because HVIRA does not change the terms or enforceability of the insurance policies issued by Plaintiffs or their foreign affiliates.

Plaintiffs counter by asserting that the express purpose of HVIRA is to force California-licensed insurers and their foreign affiliates to pay any outstanding Holocaust-era claims long after the statute of limitations for such claims has run. However, this assertion ignores the fact that the statute has several other purposes as well. As we said in our previous opinion, it "also is likely that California's legislature simply intended to protect its residents from insurance companies that have not paid valid insurance claims." *Gerling I*, 240 F.3d at 745. Further, the Commissioner has propounded other legitimate purposes for the statute, such as informing California residents about potentially valid claims and about the character of the family of companies with whom they might contract for insurance.

Plaintiffs point to two other California statutes that, they contend, *do* seek to regulate the substance of foreign transactions. California Code of Civil Procedure § 354.5 allows California residents to bring claims for the payment of Holocaust-era insurance policies and extends the statute of limitations on such claims until December 31, 2010. California Insurance Code § 790.15 requires the Commissioner to suspend

---

[6] Plaintiffs contend that HVIRA's definition of "proceeds," Cal. Ins. Code § 13802(c), rewrites the terms of the foreign insurance policies because the parties to the insurance contracts never contemplated or bargained for such a definition. However, this definition of "proceeds" is *for reporting purposes only* and does not alter the substantive terms of, or obligations arising under, any insurance policy.

the certificate of authority of any insurer who has failed to pay claims on valid Holocaust-era policies. It may well be that these statutes were enacted in excess of California's legislative jurisdiction. However, we reiterate that these separately enacted provisions are not before us.[7] Because HVIRA does not change any obligation of any party to a foreign insurance contract, it is distinguishable from the precedents examined in this section.

C. *Taxation of In-State Entities Arising From Transactions Conducted Entirely Out-of-State*

In the third category of precedents on which Plaintiffs rely, the Supreme Court has applied a due process analysis to state statutes taxing out- of-state insurance transactions. Under these cases, a statute may exceed a state's legislative jurisdiction if it taxes a foreign insurer disproportionately to its activities in the taxing state, even if the taxing statute does not change the substantive terms of any foreign insurance policy.

In *Connecticut General Life Insurance Co. v. Johnson*, 303 U.S. 77, 79, 58 S.Ct. 436, 82 L.Ed. 673 (1938), the Supreme Court invalidated a California statute taxing California-licensed insurers' receipt of premiums on reinsurance held by other California insurers. The reinsurance contracts that the state sought to tax were executed in Connecticut, where the premiums were paid and the losses, if any, were payable. *Id.* The Court found that California did not have a sufficient connection to the insurance policies to tax them because "[n]o act in the course of their formation, performance or discharge, took place" in the state. *Id.* at 81, 58 S.Ct. 436. Accordingly, the Court held that the statute violated due process: "The tax cannot be sustained either as laid on property, business done, or transactions carried on within the state, or as a tax on a privilege granted by the state." *Id.* at 82, 58 S.Ct. 436.

---

[7] In *Gerling I*, the district court held that Plaintiffs did not have standing to challenge these provisions, and Plaintiffs did not appeal this aspect of the court's decision. 240 F.3d at 742-43.

Similarly, in *American Oil Co. v. Neill*, 380 U.S. 451, 452, 85 S.Ct. 1130, 14 L.Ed.2d 1 (1965), the Court employed a due process analysis to invalidate an Idaho tax on a state-licensed dealer in motor fuels that had sold a large amount of fuel through a series of out-of-state transactions. The Court held that the state could not constitutionally tax the extraterritorial sales because they were insufficiently related to the dealer's activities within Idaho. *Id.* at 457-58, 85 S.Ct. 1130. The Court reaffirmed the principle that "there must be some definite link, some minimum connection, between a state and the person, property or transaction it seeks to tax." *Id.* at 458, 85 S.Ct. 1130 (citation and internal quotation marks omitted).

Plaintiffs argue that *Connecticut General* and *Neill* are indistinguishable from the case before us. They note that HVIRA requires California insurers to expend resources in order to disclose information about transactions that were entered into and performed (or not performed) entirely outside the state. Thus, they argue that HVIRA, like the statutory provisions analyzed in *Connecticut General* and *Neill*, imposes financial consequences on in-state insurance companies based on those companies' out-of-state activities.[8]

HVIRA is distinguishable from the statutes analyzed in *Connecticut General* and *Neill* because the only regulation that

[8] Notwithstanding the Commissioner's argument to the contrary, later decisions of the Supreme Court have not eviscerated *Connecticut General* and *Neill*. Cases such as *ASARCO Inc. v. Idaho State Tax Commission*, 458 U.S. 307, 102 S.Ct. 3103, 73 L.Ed.2d 787 (1982), and *Allied-Signal, Inc. v. Director, Division of Taxation*, 504 U.S. 768, 112 S.Ct. 2251, 119 L.Ed.2d 533 (1992), can be read as requiring the taxing state to have minimum contacts with the transaction to be taxed. *ASARCO*, 458 U.S. at 315, 327-29, 102 S.Ct. 3103 (citing *Connecticut General*); *Allied Signal*, 504 U.S. at 778, 112 S.Ct. 2251 ("Although our modern due process jurisprudence rejects a rigid, formalistic definition of minimum connection, we have not abandoned the requirement that, in the case of a tax on an activity, there must be a connection to the activity itself, rather than a connection only to the actor the State seeks to tax.").

it imposes on Plaintiffs is a duty to disclose information, rather than to pay money to the regulating state. A state's taxing the extraterritorial transactions of in-state insurance companies (thus gaining financially from a multi-jurisdictional entity's revenues) and a state's asking for information about those same transactions are qualitatively different requirements. The former is a form of direct regulation of the out-of-state transaction, and collects money on behalf of the state itself, while the latter is simply a means for the state to assure the corporate good character and financial viability of companies doing business within the state. Plaintiffs' argument proves too much, because nearly every regulatory, record-keeping, and reporting statute requires a regulated entity doing business in more than one jurisdiction to expend resources to comply. Thus, we draw a bright line between obtaining information and obtaining tax revenues, just as we drew a bright line between obtaining information and substantively regulating the topics contained in the informational reports.[9]

D. *Conclusion*

Were we to hold that a state may require companies operating within the state to *report* on only those out-of-state activities with which the state can claim minimum contacts, our

[9] We also question the force of authorities such as *Connecticut General* and *Neill* outside the context of taxation. We already have acknowledged that cases defining the outer limits of a state's power to tax are not always readily transferable to other contexts. *See, e.g., Atonio v. Wards Cove Packing Co.*, 10 F.3d 1485, 1495 n.8 (9th Cir.1993) (finding inapplicable "the line of cases . . . in which the Supreme Court has struck down discriminatory state tax provisions for lack of a rational basis" because "state tax cases may genuinely be viewed as *sui generis*; it is an area where the Supreme Court has remained active long after ceasing to invalidate other economic legislation on equal protection grounds").

logic would invalidate many existing reporting statutes.[10] State statutes and regulations routinely require multinational insurance companies, banks, and the like to disclose foreign activities and transactions engaged in by them and their parent and affiliate companies. Under Plaintiffs' strict conception of the legislative jurisdiction doctrine, states would be prohibited from requesting information about potentially fraudulent conduct committed by a local company's European parent simply because the "subject matter" of that conduct was a foreign transaction among foreign nationals. The Supreme Court cases do not contemplate the use of the legislative jurisdiction doctrine to eviscerate state regulatory power so completely.

In conclusion, the legislative jurisdiction analysis is inapplicable to HVIRA, because it does nothing more than seek information from California-licensed insurers. Therefore, the Commissioner need not prove that minimum contacts exist between California, Plaintiffs' foreign affiliates, and the Holocaust-era policies issued by them. Instead, the state's power to enact and enforce HVIRA is bounded only by other constitutional protections. It is to an analysis of these other protections that we now turn.

SUBSTANTIVE AND PROCEDURAL DUE PROCESS

The district court held that HVIRA violates procedural due process by "mandating license suspension for non-performance of what may be impossible tasks without allowing for a meaningful hearing." *Gerling II*, 186 F. Supp.2d at 1113. In the district court's view, the statute is unconstitutional because it does not allow a hearings officer to consider any excuse for

---

[10] Examples of statutes that could be constitutionally problematic under Plaintiffs' proposed analysis include: California Insurance Code § 699.5 (foreign subsidies); *id.* § 717 (qualifications for certificate of authority); *id.* §§ 1215-1215.16 (Insurance Holding Company System Regulatory Act); California Financial Code §§ 5800-5811 (savings and loan holding companies); *id.* §§ 10000-10009 (foreign savings companies).

noncompliance, even when an insurer can prove that it lacks control over the information requested or that disclosure of the information would violate foreign law. *Id.* at 1111. This aspect of the district court's decision is legally flawed because it conflates the analytically distinct concepts of procedural and substantive due process.

Regulated parties generally have a right to a meaningful hearing only with respect to those defenses actually allowed under a given statute. Thus, if a particular defense is deemed irrelevant under the statute, a party has no *procedural* due process right to a hearing with respect to that defense. Instead, the party's only avenue of recourse is to declare that it has a right to present its chosen defense as a matter of *substantive* due process. *See, e.g.*, *Burlington N.R.R. v. Dep't of Pub. Serv. Regulation*, 763 F.2d 1106, 1113 (9th Cir.1985) ("If the statute is constitutional, the lack of a hearing does not make it unconstitutional. A state does not violate due process by making a legislative determination rather than a particularized inquiry if the subject of the legislation does not interfere with the exercise of fundamental rights."); see also *Bell v. Burson*, 402 U.S. 535, 541, 91 S.Ct. 1586, 29 L.Ed.2d 90 (1971) ("The main thrust of Georgia's argument is that it need not provide a hearing on liability because fault and liability are irrelevant to the statutory scheme. We may assume that were this so, the prior administrative hearing presently provided by the State would be appropriate to the nature of the case." (citation and internal quotation marks omitted)).

Accordingly, the district court erred by not engaging in a two-step inquiry to determine, first, whether Plaintiffs were constitutionally entitled to raise foreign-affiliate and foreign-law defenses to HVIRA and, second, whether the statute provides Plaintiffs with the requisite level of process with respect to the defenses allowed under the statute. We will consider each aspect of this two-part analysis.

A. *Substantive Due Process and the Proposed Defenses*

Plaintiffs argue that, as a matter of substantive due process, they must be entitled to raise defenses premised on their lack of control over the required information or the illegality under foreign law of their disclosure of the information.[11] We are not persuaded.

Because HVIRA neither employs a suspect classification nor infringes on a fundamental right, the applicable standard of review is the rational basis test. *See Richardson v. City of Honolulu*, 124 F.3d 1150, 1162 (9th Cir.1997) ("We will strike down a statute on substantive due process grounds if it is arbitrary and irrational."); *Wedges/Ledges of Cal., Inc. v. City of Phoenix*, 24 F.3d 56, 66 (9th Cir.1994) ("When reviewing the substance of legislation or governmental action that does not impinge on fundamental rights, . . . we do not require that the government's action actually advance its stated purposes, but merely look to see whether the government *could* have had a legitimate reason for acting as it did."). Accordingly, the proper standard by which to measure HVIRA's license-revocation provisions is whether they bear "a rational relationship to a legitimate state interest." *Burlington N.*, 763 F.2d at 1109.

The Commissioner justifies the statute in several ways. First, the statute expressly states that its purpose is to provide California residents with information that facilitates their resolution of legitimate claims, if any, against private insurance companies through an international process or otherwise. Cal.

---

[11] HVIRA *does* incorporate a "literal impossibility" defense. That is, if a company's Holocaust-era records no longer exist, the statute does not require their disclosure. Cal.Code Regs. tit. 10, § 2278.2(a); *Gerling II*, 186 F. Supp.2d at 1105. The Commissioner also represents in his briefs that "[s]uspension could also be avoided if the information exists but is not in the possession, custody or control of the licensee or any of its related companies (*e.g.*, if the information is in the possession of an unrelated company or is only located in a government archive)."

Ins. Code § 13801.[12] Second, as we have acknowledged, California's legislature could have intended the statute to provide a means of protecting state residents from insurance companies that have not paid valid claims. *Gerling I*, 240 F.3d at 745. Third, the state has a legitimate interest in providing information to its citizens about the character of the family of insurance companies from which they are contemplating buying insurance.

Plaintiffs counter that the sole express *and* implicit purpose of the law is to force California-licensed insurers and their foreign affiliates to pay Holocaust-era claims. They ask us to reject the Commissioner's assertion of alternative purposes. Although subjectively the legislature's main purpose was to facilitate payment of Holocaust-era claims, we read the legislature's declared purposes to be somewhat broader than that. *See* Cal. Ins. Code § 13801(c), (e) (stating in part that insurers may be the sole source of information about Holocaust-era policies and that insurers have a responsibility to disclose that information to the state).

More importantly, however, the legislature's subjective or declared purpose is irrelevant in the context of rational basis review. A statute must be upheld under the rational basis analysis if it can be justified by *any* legitimate purpose, even one on which the government did not rely in enacting the statute, and even if the statute does a poor job of advancing the intended aims. *Dittman*, 191 F.3d at 1031 ("[W]e do not require that the government's action actually advance its stated purposes, but merely look to see whether the government *could* have had a legitimate reason for acting as it did." (citation and internal quotation marks omitted)); *Richardson*, 124 F.3d at

---

[12] Helping California residents recover on valid insurance claims is a legitimate governmental purpose. The record shows that many Holocaust survivors are poor; to the extent that information can facilitate their recovery of insurance (through the means that Plaintiffs themselves recognize as valid, or otherwise), it will ease the burden on the state's fisc.

1162 ("In a substantive due process challenge, we do not require that the City's legislative acts actually advance its stated purposes . . . ." (citation and internal quotation marks omitted)).

Faced with precedent suggesting that the California legislature's actual subjective or declared purpose in enacting the statute is irrelevant, Plaintiffs next argue that HVIRA's reporting requirements are not rationally related to any of the asserted purposes of the statute. They argue that the significance of the information requested under HVIRA cannot be analyzed meaningfully without considering whether Plaintiffs' affiliates were legally obligated to pay policyholders under foreign law. Similarly, they contend that, if the statute were directed at the integrity of California licensees, it would seek information not only on foreign affiliates' payment of Holocaust-related claims in Europe between 1920 and 1945, but also on all other aspects of the affiliates' claims-handling history. Further, they argue that there is no evidence of a relationship between Plaintiffs' current claims-handling practices in California and the claims-handling practices of their foreign affiliates in Europe dating back more than half a century ago. In other words, they argue that HVIRA is over-inclusive in some respects and under-inclusive in others.

But, under the rational basis test, California need not demonstrate that the statute will *actually* serve the articulated purposes. Instead, the statute is constitutional if the legislature rationally could have *believed* that HVIRA would promote a legitimate objective. *Dittman*, 191 F.3d at 1032; *Burlington N.*, 763 F.2d at 1110. Further, a statute need not be a comprehensive response to a given problem to be rationally related to a legitimate governmental interest. Instead, legislation may proceed " 'one step at a time' " and still satisfy the rational basis test. *Nat'l Ass'n for the Advancement of Psychoanalysis v. Cal. Bd. of Psychology*, 228 F.3d 1043, 1052-53 (9th Cir.2000) (quoting *Williamson*, 348 U.S. at 489, 75 S. Ct. 461), *cert. denied*, 532 U.S. 972, 121 S. Ct. 1602, 149 L.Ed.2d 469 (2001). The Holocaust is unique, and California's

decision to proceed first with respect to these particular claims is both understandable and permissible. Finally, it is not only the claims-handling practices of 50 years ago that are at issue, but also the current and continuing failure of California-licensed insurers and their foreign affiliates to disclose information about any outstanding potentially valid claims.

Having thus established that, in general, HVIRA is constitutional under the rational basis test, we next must address whether the statute's failure to provide for foreign-affiliate and foreign-law defenses is *also* rationally related to legitimate governmental interests. We conclude that, even assuming that the California licensees do not have control of information in the hands of their foreign affiliates and that disclosure pursuant to HVIRA violates European data protection laws, those facts do not make the statute unconstitutional because it was rational for the legislature to require disclosure as a condition to holding an insurance license in California. We agree with the Commissioner that the suggested defenses would hamper the state's ability to provide information to Holocaust victims and their families about potentially valid claims, to protect California citizens from insurance companies that have a history of refusing to pay valid claims or of refusing to inform potential beneficiaries about policy proceeds to which they may be entitled, and to inform California citizens about the character of the family of insurance companies from which they are contemplating buying insurance. California is entitled to condition the privilege of doing business in the state on the disclosure of information in which California has a legitimate interest.

Were a defense based on lack of control over requested information a requirement of substantive due process, an insurer could evade *any* kind of state disclosure statute or regulation simply by transferring all relevant documents to an affiliate over which it lacks direct control. Similarly, were a defense premised on foreign law required by due process, state

regulatory efforts could be hindered by foreign statutes enacted for the purpose of shielding foreign corporations from routine reporting requirements.

Plaintiffs respond that, public policy notwithstanding, substantive due process requires that they be allowed to raise these defenses. They rely heavily on *Societe Internationale Pour Participations Industrielles et Comerciales, S.A. v. Rogers*, 357 U.S. 197, 78 S. Ct. 1087, 2 L.Ed.2d 1255 (1958); *Falstaff Brewing Corp. v. Miller Brewing Co.*, 702 F.2d 770, 782- 83 & n. 8 (9th Cir.1983); and *In re United States v. Sumitomo Marine & Fire Insurance Co.*, 617 F.2d 1365, 1369 (9th Cir.1980).

However, those cases are easily distinguishable. *Societe Internationale* concerned only "whether Fifth Amendment due process is violated by the striking of a complaint because of a plaintiff's inability, despite good-faith efforts, to comply with a pretrial production order." 357 U.S. at 210, 78 S. Ct. 1087. The Supreme Court made a point to limit its decision to the context of discovery sanctions:[13] "We do not say that this ruling would apply to every situation where a party is restricted by law from producing documents over which it is otherwise shown to have control." *Id.* at 205-06, 78 S. Ct. 1087. In *Sumitomo*, this court *affirmed* a discovery sanction tantamount

---

[13] Courts discussing *Societe Internationale* have interpreted the reach of its due process holding narrowly even in the context of discovery sanctions. *See, e.g., Richmark Corp. v. Timber Falling Consultants*, 959 F.2d 1468, 1474 (9th Cir.1992) ("Cases since *Societe Internationale*, however, have emphasized that a foreign-law prohibition will not always excuse compliance with a discovery order."); *United States v. Vetco, Inc.*, 691 F.2d 1281, 1287 (9th Cir.1981) ("*Societe Internationale* did not erect an absolute bar to summons enforcement and contempt sanctions whenever compliance is prohibited by foreign law."); *United States v. Bank of Nova Scotia (In re Grand Jury Proceedings)*, 691 F.2d 1384, 1388 (11th Cir.1982) ("[T]he Supreme Court did not erect an absolute bar to sanctions being imposed for noncompliance with summons or subpoenas whenever compliance is prohibited by foreign law.").

to dismissal even though the government-plaintiff was unable to comply with the district court's discovery orders due to "serious understaffing" rather than bad faith. 617 F.2d at 1369-70. Finally, *Falstaff* dealt with sanctions arising in the context of criminal contempt, where willful disobedience of a court order must be proved beyond a reasonable doubt. 702 F.2d at 782. We have found no decision holding that privacy protections under foreign law, or lack of control over information, excuses compliance with disclosure obligations required as a condition for obtaining or retaining a business license.

By contrast, other persuasive precedents support the proposition that a statute may be constitutional yet at the same time make no allowance for an "impossibility" defense. *See, e.g., Danfield v. Johns Manville Sales Corp. (In re Asbestos Litigation)*, 829 F.2d 1233, 1235, 1244 (3d Cir. 1987) (upholding the constitutionality of state law prohibiting defendants from raising an impossibility defense to tort claims); *United States v. City of Hoboken*, 675 F.Supp. 189, 197-98 (D.N.J. 1987) (rejecting the defendant's substantive due process argument "that constitutional principles of fundamental fairness mandate an impossibility defense" to the Clean Water Act); *cf. Hawkins v. Agric. Mktg. Serv.*, 10 F.3d 1125, 1134 (5th Cir. 1993) (holding that a statute did not violate due process even though it mandated revocation of the plaintiff's license in response to behavior in which the plaintiff took no part, and despite the fact that the plaintiff had no opportunity to demonstrate his innocence).

Because a defense based on lack of control over records or on the conflicting demands of foreign law would thwart the legitimate regulatory purposes of HVIRA, we find no violation of substantive due process.

B. *Procedural Due Process Under HVIRA*

Plaintiffs argue that HVIRA is unconstitutional on its face because it makes no provision for a hearing prior to revocation

of an insurance company's license. The statute provides that "[t]he Commissioner *shall* suspend the certificate of authority to conduct insurance business in the state of any insurer that fails to comply with [HVIRA]." Cal. Ins. Code § 13806 (emphasis added). However, because the statute must be, and in fact is, interpreted to require such a hearing, HVIRA does not violate procedural due process on its face.

Plaintiffs' licenses to do business in California are protected property interests. *See Bell*, 402 U.S. at 539, 91 S. Ct. 1586 ("Once licenses are issued, . . . their continued possession may become essential in the pursuit of a livelihood. Suspension of issued licenses thus involves state action that adjudicates important interests of the licensees. In such cases the licenses are not to be taken away without that procedural due process required by the Fourteenth Amendment."). The state may not revoke a protected property interest without first providing a meaningful hearing. *Mathews v. Eldridge*, 424 U.S. 319, 333, 96 S.Ct. 893, 47 L.Ed.2d 18 (1976); *Bell*, 402 U.S. at 541-42, 91 S.Ct. 1586.

Because HVIRA does not expressly provide for such a hearing, Plaintiffs assert that it is facially unconstitutional. What this argument fails to recognize is that, under California law, such a hearing must be implied into the statute. The state's administrative procedure act requires the provision of those procedures that are required by the federal or state constitutions. Cal. Gov't Code § 11410.10. Further, the California Supreme Court has established a presumption that hearing requirements should be inferred in a statute like HVIRA "unless the statute expressly provides to the contrary." *Fascination, Inc. v. Hoover*, 39 Cal.2d 260, 246 P.2d 656, 662 (1952).

Thus, when read in the context of other state law, HVIRA requires the Commissioner to hold a hearing before revoking the license of an allegedly noncomplying insurance company. He concedes that this is so. As properly and as actually

interpreted, therefore, the statute is not facially unconstitutional for failure expressly to provide for a hearing.

OTHER CONSTITUTIONAL CLAIMS

In addition to making due process arguments, Plaintiffs claim that HVIRA violates the foreign affairs power of the United States, the Commerce Clause, the Bill of Attainder Clause, the Equal Protection Clause, the Fourth Amendment, and the Contract Clause. None of these arguments provides a persuasive alternative justification for affirming the district court's decision.

A. *Foreign Affairs Power and Commerce Clause*

In response to Plaintiffs' challenges based on the foreign affairs power and the Commerce Clause, we already have held that HVIRA is *facially* constitutional. *Gerling I*, 240 F.3d at 751, 743. We are not persuaded that we erred.

Plaintiffs now argue that, *as applied*, HVIRA runs afoul of these constitutional provisions.[14] As discussed above, California has urged foreign insurers to help their state-licensed affiliates comply with HVIRA, but it has not sought to regulate these foreign insurers directly. That being so, the record contains insufficient evidence to demonstrate that the statute, as applied to Plaintiffs, is unconstitutional under the foreign affairs power or the Commerce Clause.

B. *Bill of Attainder Clause*

Next, Plaintiffs argue that HVIRA constitutes a bill of attainder because the statute seeks to punish a specific person or group of persons for past conduct without a judicial trial. *See* U.S. Const. art. I, § 10, cl. 1. We disagree.

---

[14] As Plaintiffs Assicurazioni Generali, American Insurance Association, and American Reinsurance Company candidly admit, "[i]nsurers ask the Court to *reconsider* its holdings on their foreign affairs power and Foreign Commerce Clause claims." (Emphasis added.)

"Three requirements must be met to establish a violation of the bill of attainder clause: '[S]pecification of the affected persons, punishment, and lack of a judicial trial.'" *United States v. Munsterman*, 177 F.3d 1139, 1141 (9th Cir.1999) (quoting *Selective Serv. Sys. v. Minn. Pub. Interest Research Group*, 468 U.S. 841, 847, 104 S.Ct. 3348, 82 L.Ed.2d 632 (1984)). Assuming — without deciding — that HVIRA meets the first and third elements, it fails to meet the second.

We consider three factors when determining whether "a statute inflicts punishment that implicates the Bill of Attainder Clause." *Fresno Rifle & Pistol Club, Inc. v. Van De Kamp*, 965 F.2d 723, 728 (9th Cir.1992). We ask "(1) whether the challenged statute falls within the historical meaning of legislative punishment; (2) whether the statute, 'viewed in terms of the type and severity of burdens imposed, reasonably can be said to further nonpunitive legislative purposes'; and (3) whether the legislative record 'evinces a[n] . . . intent to punish.'" *Id.* (quoting *Selective Serv. Sys.*, 468 U.S. at 852, 104 S. Ct. 3348).

First, the statute does not fall within the historical meaning of legislative punishment. The ultimate sanction available to the Commissioner, suspension of an insurer's license to do business, may be such a punishment. *See Nixon v. Adm'r of Gen. Servs.*, 433 U.S. 425, 474-75, 97 S.Ct. 2777, 53 L.Ed.2d 867 (1977) (noting that legislative punishment includes "barring designated individuals or groups from participation in specified employments or vocations"); *Selective Serv. Sys.*, 468 U.S. at 852, 104 S.Ct. 3348 ("[T]he list of punishments forbidden by the Bill of Attainder Clause has expanded to include legislative bars to participation by individuals or groups in specific employments or professions."). Even if it is, however, suspension can occur only after a California insurer fails to comply with the statutory demand for information; that is, the statute imposes a sanction on the basis of an insurer's future conduct. Generally, a statute that leaves open the possibility of compliance, and thus avoidance of punishment,

does not fall within the historical meaning of legislative punishment. *See id.* at 853, 104 S.Ct. 3348 (upholding a statute denying educational funding to students who failed to register for the draft, in part because the statute allowed students to qualify for aid after properly registering).

Second, as discussed above, HVIRA furthers nonpunitive legislative purposes: providing data to Holocaust victims and their families about potentially valid claims, protecting California citizens from insurance companies that have a history of refusing claims or refusing to disclose information, and telling California citizens about the character of the family of insurance companies from which they are contemplating buying insurance.

Third, the legislative record does not evince an intent to punish foreign insurance companies or their California-licensed affiliates. As even Plaintiffs concede, the text of the statute and its legislative history demonstrate that the statute was subjectively intended as a means of facilitating payment of Holocaust-era policies.[15] Being asked to account for potentially valid insurance claims is not punishment, even if it proves embarrassing to some insurers. Nowhere in the statute's history does the California legislature express a desire to "punish" California insurers or their foreign affiliates. Because HVIRA is not a "punishment," it is not an unconstitutional bill of attainder.

C. *Contract Clause*

Plaintiffs assert that HVIRA violates the Contract Clause by attempting to modify the express terms of European insurance policies. *See* U.S. Const. art. I, § 10, cl. 1. By doing so, they argue, HVIRA would substantially impair the rights and responsibilities of parties to private contracts entered into

---

[15] The other legitimate purposes that we have discussed above, to the extent that they are reflected in the legislative record, likewise involve no intent to punish insurers.

decades ago and having no relation to California. As we have explained, this argument mischaracterizes the nature of the statute and the relevance of its definition of the term "proceeds." HVIRA, as distinct from other California statutes whose constitutionality is *not* at issue here, does not compel payment of any Holocaust-era claim and does not alter the substance of any insurance contract. Accordingly, HVIRA does not violate the Contract Clause.

D. *Equal Protection Clause*

Plaintiffs argue that HVIRA violates equal protection. However, Plaintiffs do not assert that the statute treats them differently as a result of their membership in a protected class. Instead, they claim only that HVIRA imposes weightier reporting burdens on insurance companies that either directly or through related entities sold insurance policies in Europe from 1920 to 1945. In the circumstances, we evaluate the equal protection challenge under the rational basis test. *W. & S. Life Ins. Co. v. State Bd. of Equalization of Cal.*, 451 U.S. 648, 668, 101 S.Ct. 2070, 68 L.Ed.2d 514 (1981).

In this context, Plaintiffs again urge that the Commissioner can articulate no rational basis sufficient to justify the statute. However, for the reasons discussed above, we disagree. Consequently, the insurers have not demonstrated that HVIRA violates equal protection.

E. *Fourth Amendment*

Finally, Plaintiffs argue that HVIRA violates the Fourth Amendment. Like the equal protection argument, however, this claim is simply a rearticulation of another argument: Because HVIRA purportedly exceeds California's legislative jurisdiction, its investigation into the affairs of European insurance companies is an unconstitutional search. According to Plaintiffs, an investigation exceeds the scope of a governmental agency's investigatory power if it is one that the demanding agency is not authorized to make. They cite in

support of this proposition *Oklahoma Press Publishing Co. v. Walling*, 327 U.S. 186, 208, 66 S.Ct. 494, 90 L.Ed. 614 (1946).

We have no quarrel with the general proposition. But HVIRA does not empower the Commissioner to make disclosure requests that exceed his constitutional authority. Therefore, the statute does not violate the Fourth Amendment in the manner argued.

ATTORNEY FEES

Plaintiffs assert that the district court abused its discretion by denying their motion for attorney fees. Because the district court improperly concluded that HVIRA was unconstitutional, it also erred in concluding that Plaintiffs were "prevailing parties" for the purposes of 42 U.S.C. § 1988. They are not entitled to fees.

CONCLUSION

HVIRA is not unconstitutional in any of the particulars argued by Plaintiffs. The district court erred in concluding otherwise.

REVERSED and REMANDED with instructions to vacate the injunction and to grant the Commissioner's motion for summary judgment.

APPENDIX B

FOR PUBLICATION

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

No. 00-16163
D.C. No. CV-00-00506-WBS

GERLING GLOBAL REINSURANCE CORP. OF AMERICA; GERLING GLOBAL REINSURANCE CORP. — U.S. BRANCH; GERLING GLOBAL LIFE REINSURANCE COMPANY; GERLING GLOBAL LIFE INSURANCE COMPANY; GERLING AMERICA; INSURANCE COMPANY; and CONSTITUTION INSURANCE CORP., *Plaintiffs-Appellees,*

v.

HARRY W. LOW,* in his capacity as the COMMISSIONER OF INSURANCE OF THE STATE OF CALIFORNIA, *Defendant-Appellant.*

No. 00-16164
D.C. No. CV-00-00875-WBS

ASSICURAZIONI GENERALI, *Plaintiff-Appellee,*

v.

HARRY W. LOW, individually, and in his capacity as the INSURANCE COMMISSIONER for the STATE OF CALIFORNIA, *Defendant-Appellant.*

---

* Harry W. Low is substituted for his predecessor as Commissioner of Insurance for the State of California. Fed. R. App. P. 43(c)(2).

No. 00-16165
D.C. No. CV-00-00779-WBS

WINTERTHUR INTERNATIONAL AMERICA INSURANCE COMPANY; WINTERTHUR INTERNATIONAL AMERICA UNDERWRITERS INSURANCE COMPANY; GENERAL CASUALTY COMPANY OF WISCONSIN; REGENT INSURANCE COMPANY; REPUBLIC INSURANCE COMPANY; SOUTHERN INSURANCE COMPANY; UNIGARD INDEMNITY COMPANY; UNIGARD INSURANCE COMPANY; and BLUE RIDGE INSURANCE COMPANY, *Plaintiffs-Appellees,*

v.

HARRY W. LOW, in his capacity as INSURANCE COMMISSIONER for the STATE OF CALIFORNIA, *Defendant-Appellant.*

No. 00-16182
D.C. No. CV-00-00613-WBS

AMERICAN INSURANCE ASSOCIATION and AMERICAN RE-INSURANCE COMPANY, *Plaintiffs-Appellees,*

v.

HARRY W. LOW, in his capacity as INSURANCE COMMISSIONER for the STATE OF CALIFORNIA, *Defendant-Appellant.*

Appeals from the United States District Court
for the Eastern District of California,
William B. Shubb, District Judge, Presiding.

Argued and Submitted:
January 9, 2001 — San Francisco, California.
Filed: February 7, 2001

Before: Alfred T. Goodwin, Susan P. Graber, and
Richard A. Paez, Circuit Judges

OPINION

GRABER, Circuit Judge:

Plaintiffs are three insurance companies and one trade organization of insurance companies who do business in California. They sued the California Commissioner of Insurance (Commissioner) seeking declaratory and injunctive relief to bar enforcement of the Holocaust Victim Insurance Relief Act of 1999 (HVIRA), Cal. Ins. Code §§ 13800-13807 (1999). The district court issued a preliminary injunction after ruling that Plaintiffs had established a likelihood of irreparable harm and a probability of success on the merits of the questions whether HVIRA violates the Commerce Clause and whether it violates the federal government's "foreign affairs" power. The Commissioner brings this appeal. We leave the preliminary injunction in place, but for reasons different than those expressed by the district court.

FACTUAL AND PROCEDURAL HISTORY

HVIRA requires insurers that do business in California and that sold insurance policies, in effect between 1920 and 1945 (Holocaust-era policies), to persons in Europe to file certain information about those policies with the Commissioner.[1] Cal.

---

[1] The information that the insurance companies must provide is: (1) the number of insurance policies; (2) the holder, beneficiary, and current status of each policy; and (3) the city of origin, domicile, or address for each policyholder listed in each policy. Cal. Ins. Code § 13804(a)(1)-(3). In addition, the insurer must certify that: (1) the proceeds of the policies were paid; or (2) the beneficiaries or heirs could not be located after diligent search, and the proceeds were distributed to Holocaust survivors or charities; or (3) a court of law has certified a plan for distributing the proceeds; or (4) the proceeds have not been distributed. *Id.* § 13804(b)(1)-(3). The implementing regulations state that, if "the insurer states that it has no actual policies to report because the records are no longer in the possession of the insurer or its related company(ies), it shall provide a complete explanation of that statement." Cal. Code Regs. tit. 10, § 2278.2(a) (2000). Any insurer who knowingly files false information is subject to a penalty of up to $5,000. Cal. Ins. Code § 13805.

Ins. Code § 13804(a). The reporting requirement also applies to insurance companies that do business in California and are "related" to a company that sold Holocaust-era policies, even if the relationship arose after the policies were issued. *Id.* A "related company" is any "parent, subsidiary, reinsurer, successor in interest, managing general agent, or affiliate company of the insurer." *Id.* § 13802(b). HVIRA requires the Commissioner to store the information in a public "Holocaust Era Insurance Registry." *Id.* § 13803. The Commissioner must "suspend the certificate of authority to conduct insurance business in the state of any insurer that fails to comply" with HVIRA's reporting requirements. *Id.* § 13806.

Plaintiffs filed four separate actions against the Commissioner, in which they sought to enjoin enforcement of HVIRA. The actions were brought by: (1) Gerling Global Reinsurance Corp. of America and its affiliates (collectively, Gerling), who are, according to their complaint, "arguably 'affiliated' [with] . . . or 'related to'" two German insurers that issued Holocaust-era policies; (2) American Insurance Association (AIA), a nonprofit trade association of insurers whose member-insurers are required to report under HVIRA, and American Re-insurance Company, a wholly owned subsidiary of a German corporation "that has investment interests in European insurance companies that do issue insurance policies"; (3) Winterthur International America

Insurance Company, its affiliates, and numerous other insurance and underwriting companies (collectively, Winterthur), who are "arguably 'related companies' . . . with more than forty insurance companies currently located in Europe"; and (4) Assicurazioni Generali (Generali), an Italian insurance company that issued Holocaust-era policies and currently does business in California. The district court determined that the four cases were "related" within the meaning of Eastern District of California Local Rule 123(a) and assigned the cases to the same judge, but did not consolidate them.

Plaintiffs sought declaratory and injunctive relief, claiming that HVIRA violates the Commerce Clause, the Due Process Clause, the Equal Protection Clause, and the foreign affairs power. Gerling also asked the court to review two statutes that were enacted at the same time as HVIRA: (1) California Code of Civil Procedure § 354.5 (1999), which allows California residents to bring claims for the payment of Holocaust-era insurance policies and extends the statute of limitations on such claims until December 31, 2010; and (2) California Insurance Code § 790.15 (1999), which requires the Commissioner to suspend the certificate of authority of any insurer who has failed to pay on valid Holocaust-era policies. The Commissioner filed a motion to dismiss in which he argued that Gerling did not have standing to challenge California Code of Civil Procedure § 354.5 or California Insurance Code § 790.15. The district court granted the motion, ruling that Gerling had not established an imminent threat of prosecution under those statutes. Gerling does not challenge that holding.

Plaintiffs all filed motions for a preliminary injunction. The district court granted their motions, holding that "plaintiffs have established a probability of success under the foreign affairs doctrine and the Commerce Clause." The court did not rule on Plaintiffs' other grounds for relief. The district court also held that Plaintiffs had established the likelihood of irreparable injury.

The Commissioner timely appealed the district court's orders in all four cases. We have jurisdiction under 28 U.S.C. § 1292(a)(1). Because these cases all involve the same legal issues, we consider them together.

STANDARD OF REVIEW

We review for abuse of discretion the grant of a preliminary injunction. *FDIC* v. *Garner*, 125 F.3d 1272, 1276 (9th Cir. 1997). A district court abuses its discretion if it bases its ruling on an erroneous view of the law or on a clearly erroneous assessment of the evidence. *Roe* v. *Anderson*, 134 F.3d 1400, 1402 (9th Cir. 1998).

DISCUSSION

A. *The Standard for Issuing a Preliminary Injunction*

"To obtain a preliminary injunction, a party must establish either: (1) probable success on the merits and irreparable injury, or (2) sufficiently serious questions going to the merits to make the case a fair ground for litigation with the balance of hardships tipping decidedly in its favor." *Baby Tam & Co.* v. *City of Las Vegas*, 154 F.3d 1097, 1100 (9th Cir. 1998). The two alternatives represent two points on a sliding scale. *Roe*, 134 F.3d at 1402. The district court held that Plaintiffs' actions fell within the first category. The Commissioner does not dispute the district court's finding of irreparable injury; rather, he questions whether the district court abused its discretion in ruling that Plaintiffs established a probability of success on the merits.

The district court's reasoning implies that Plaintiffs demonstrated a probability of success on their claim that HVIRA is unconstitutional on its face. The court did not make individualized findings of irreparable injury, nor did it discuss either constitutional claim in the context of a particular Plaintiff. As presented in this appeal, Plaintiffs' challenges to HVIRA involve issues of law only.

B. *The Commerce Clause Claim*

As noted, the district court held that Plaintiffs established a probability of success that HVIRA violates the Commerce Clause. We disagree and hold that the district court based its conclusion on an erroneous view of the law.

1. *The McCarran-Ferguson Act, 15 U.S.C. §§ 1011-1014 (1945) (McCarran Act)*

In *United States* v. *South-Eastern Underwriters Ass'n*, 322 U.S. 533, 553, 88 L. Ed. 1440, 64 S. Ct. 1162 (1944), the Supreme Court held that the "business of insurance" fell within Congress' power to regulate interstate commerce. That holding conflicted with the previous understanding of the relationship between the business of insurance and the Commerce Clause; before 1944, the Court had implied that the states could regulate the insurance industry without federal interference. *See Prudential Ins. Co.* v. *Benjamin*, 328 U.S. 408, 414-16, 90 L. Ed. 1342, 66 S. Ct. 1142 (1946) (discussing the history of insurance regulation and the Commerce Clause).

The McCarran Act was Congress' response. *Id.* Title 15, § 1011 of the McCarran Act states:

> Congress hereby declares that the continued regulation and taxation by the several States of the business of insurance is in the public interest, and that silence on the part of the Congress shall not be construed to impose any barrier to the regulation or taxation of such business by the several States.

Section 1012(a) provides that the "business of insurance . . . shall be subject to the laws of the several States which relate to the regulation or taxation of such business." The phrase "business of insurance" refers to "the relationship between the insurance company and the policyholder " and includes "the fixing of rates[,] . . . the selling and advertising of policies, and the licensing of companies and their agents." *SEC*

v. *National Sec., Inc.*, 393 U.S. 453, 460, 89 S. Ct. 564, 21 L. Ed. 2d 668 (1969) (citations omitted).

2. *The McCarran Act Applies to HVIRA*

Plaintiffs argue, and the district court held, that the McCarran Act does not apply to HVIRA because it is an impermissible "extraterritorial" regulation, as discussed by the Supreme Court in *FTC* v. *Travelers Health Ass'n*, 362 U.S. 293, 80 S. Ct. 717, 4 L. Ed. 2d 724 (1960), and by this court in *Ace Check Cashing, Inc.* v. *Aetna Casualty & Surety Co. (In re Insurance Antitrust Litigation)*, 938 F.2d 919 (9th Cir. 1991), *aff'd in part, rev'd in part sub nom. Hartford Fire Ins. Co.* v. *California*, 509 U.S. 764, 125 L. Ed. 2d 612, 113 S. Ct. 2891 (1993). Neither *Travelers* nor *In re Insurance* applies to the present dispute, however.

Travelers and *In re Insurance* involved the interpretation of § 1012(b) of the McCarran Act, which instructs courts not to construe any other federal statute as preempting a state insurance regulation unless there is a clear statement from Congress to do so. Section 1012(b) reads in part: "No Act of Congress shall be construed to invalidate, impair, or supersede any law enacted by any State for the purpose of regulating the business of insurance . . . unless such Act specifically relates to the business of insurance[.]" Section 1012(b) also provides that the Sherman Act, the Clayton Act, and the Federal Trade Commission (FTC) Act *do* apply to the "business of insurance," but only "to the extent that such business is not regulated by State law."

The Supreme Court in *Travelers* and this court in *In re Insurance* held that Congress did not intend to shield an insurance company from federal regulation if one state expressly regulated an insurance company's conduct, but the conduct that the federal government sought to regulate occurred in a different state. In *Travelers*, a Nebraska statute prohibited Nebraska insurance corporations from engaging in unfair trade practices "in any other state." 362 U.S. at 296. A Nebraska

insurance corporation argued that the Nebraska statute precluded the FTC, under § 1012(b) of the McCarran Act, from regulating conduct of the insurance corporation that occurred outside Nebraska. The Supreme Court disagreed, concluding that Congress did not intend for the "law of a single State [to take] from the residents of every other State the protection of the" FTC Act. *Id.* at 298.

The Court observed that Congress had delegated its power to regulate insurance because it believed that insurance regulation was a local matter. *Id.* at 302. The Court reasoned that the insurance company's argument would subvert the McCarran Act; if one state had a fair-trade statute that purported to regulate nationwide, an insurance company located there would be free from the reach of the FTC Act in every other state. The Court's interpretation of 15 U.S.C. § 1012(b) avoided this absurd result.

Similarly, in *In re Insurance*, this court applied *Travelers* to reject the notion that Congress intended for the antitrust law of a single state to preclude application of the Sherman Act to insurers' conduct that occurred in other states. *In re Insurance*, 938 F.2d at 928. We noted that "state insurance schemes do not, and could not, purport to regulate the bulk of international insurance transactions." *Id.* (citation and internal quotation marks omitted).

In neither case did the court evaluate the constitutionality under the Commerce Clause of the state act that attempted to regulate "extraterritorially." Instead, both cases involved statutory interpretation. The courts merely held that, irrespective of the constitutional limits of a state's power to regulate extraterritorially, Congress did not intend for the regulatory scheme of one state to protect the citizens of all other states and thereby eliminate the need for federal regulation.

There is a second important distinction between the two cited cases and the present dispute: the difference between

HVIRA and the state laws considered in *Travelers* and *In re Insurance*. In those cases, the state laws sought to regulate directly the conduct of an insurer in another jurisdiction. By contrast, HVIRA seeks only to obtain information about conduct in another jurisdiction, without affecting directly any of that conduct. For those two reasons, neither *Travelers* nor *In re Insurance* answers the question that we face.

The district court's holding that the McCarran Act does not apply to HVIRA also rested on its belief that HVIRA must be viewed as a part of California's overall plan to force foreign insurance companies to settle insurance claims with California's residents. The district court cited HVIRA's legislative findings and declarations and held that HVIRA encourages the resolution of claims concerning Holocaust-era policies "through an international process" and thus attempts to "regulate the decision making authority of European insurance companies to pay or not to pay claims on European policies." That reasoning mischaracterizes HVIRA as a matter of law.

HVIRA, by its terms, does not regulate "the decision making authority of European insurance companies to pay or not to pay claims on European policies" in any way. HVIRA requires California companies only to *provide information* about Holocaust-era insurance policies that they (or any of their affiliates) issued.

A second and separate statute, California Code of Civil Procedure § 354.5, allows California residents to bring claims for payment of Holocaust-era insurance policies. A third statute, California Insurance Code § 790.15, authorizes the Commissioner to suspend the licenses of insurance companies who have not paid valid Holocaust-era claims. The district court dismissed Gerling's action challenging the validity of those two provisions because Gerling lacked standing. In short, the question of the validity of those two statutes must remain for another day.

It is true that, by enacting HVIRA, California's legislature intended to help California residents recover on unpaid policies that were entered into in foreign countries by giving them access to information. It also is likely that California's legislature simply intended to protect its residents from insurance companies that have not paid valid insurance claims.[2] In any event, however, the legislature's stated purpose in enacting a statute is not dispositive of a dormant Commerce Clause challenge. The Commerce Clause seeks to prevent extraterritorial economic "effects," not purposes. *See Healy* v. *Beer Inst.*, 491 U.S. 324, 336, 105 L. Ed. 2d 275, 109 S. Ct. 2491 (1989) ("The critical inquiry is whether the *practical effect* of the regulation is to control conduct beyond the boundaries of the State." Extraterritorial regulation "is invalid regardless" of the intent of the enacting legislature.) (emphasis added); *Birth Hope Adoption Agency, Inc.* v. *Arizona Health Care Cost Containment Sys.*, 218 F.3d 1040, 1044 (9th Cir. 2000) ("The first step in evaluating state regulatory measures under the dormant Commerce Clause is to determine whether it regulates evenhandedly with only incidental effects on interstate commerce, or discriminates against interstate commerce.") (citations and internal quotation marks omitted).

HVIRA's reporting requirements might force a "related" company of a California business to search for information, but that is the extent of HVIRA's "extraterritorial" reach. HVIRA, on its face, does not regulate foreign insurance policies, or control the substantive conduct of a foreign insurer, or otherwise affect "the business of insurance " in any other country.

---

[2] The state requests information from foreign insurers in other contexts, too. For example, California Insurance Code § 699.5 (1994) requires insurers that are owned, operated, or controlled by other governments to provide information so that the Commissioner can determine whether "the insurer is subject to any form of subsidy that would enable it to compete unfairly with domestic insurers."

In conclusion, Congress has expressly delegated to the states the power to regulate insurance, free from the constraints of the dormant Commerce Clause. The Supreme Court has noted that the "licensing of companies " is part of the "business of insurance" and is covered by the McCarran Act.[3] *National Sec.*, 393 U.S. at 460. HVIRA is a California insurance regulation of California insurance companies that affects foreign commerce only indirectly. Consequently, the McCarran Act applies and the dormant Commerce Clause does not. *See Benjamin*, 328 U.S. at 430-31 (noting that Congress, through the McCarran Act, "clearly put the full weight of its power behind existing and future state legislation to sustain it from any attack under the commerce clause to whatever extent this may be done with the force of that power behind it, subject only to the exceptions expressly provided for").

3. *HVIRA Does Not Impede the Federal Government's Ability to Speak With "One Voice" on a Matter Affecting Foreign Commerce*

HVIRA touches on foreign commerce because of the indirect effect described above. The question remains whether that fact provides an independent reason to hold that Plaintiffs have established a probability that HVIRA is unconstitutional. The answer is "no."

The Supreme Court confronted a similar issue in *Barclays Bank PLC* v. *Franchise Tax Board*, 512 U.S. 298, 129 L. Ed. 2d 244, 114 S. Ct. 2268 (1994). There, the Court considered whether California's worldwide-reporting tax system violated the dormant Commerce Clause. The Supreme Court, after noting that the California tax was constitutional under typical dormant Commerce Clause analysis, evaluated whether the

---

[3] Plaintiffs implicitly recognize that HVIRA regulates the "business of insurance." Seeking information from insurers about their claims-paying record, to be used in the licensing process, is a form of regulating the business of insurance.

tax's effect on *foreign* commerce impaired the federal government's ability to speak with "one voice." *Id.* at 328. The Court held that it did not. *Id.*

The Court noted that Congress had considered, and eventually rejected, legislation that would have precluded state statutes like the one in dispute in *Barclays*. *Id.* at 324-28. The Court reasoned that Congress was willing "to tolerate" the states' worldwide-reporting tax statutes. *Id.* at 327. Significantly, the Court then observed that "the foreign policy of the United States . . . [is] much more the province of the Executive Branch and Congress than of this Court"; therefore, the foreign companies' argument that the California statute "is unconstitutional because it is likely to provoke retaliatory action by foreign governments is directed to the wrong forum." *Id.* at 327-28 (citation and internal quotation marks omitted).

Similarly, in *Wardair Canada, Inc.* v. *Florida Department of Revenue*, 477 U.S. 1, 106 S. Ct. 2369, 91 L. Ed. 2d 1 (1986), the Court evaluated whether a Florida tax on airline fuel, which increased the tax liability of foreign airlines, prevented the federal government from speaking with "one voice." The Court concluded that the Florida tax did not violate the Commerce Clause. *Id.* at 12-13. The federal government had entered into more than 70 bilateral aviation agreements, none of which purported to *preclude* the type of tax enacted by Florida. The Court reasoned: "By negative implication . . ., the United States has at least acquiesced" in the type of statute enacted by Florida. *Id.* at 12. Moreover, "it would turn dormant Commerce Clause analysis upside down to apply it where the Federal Government has acted, and to apply it in such a way as to *reverse* the policy that the Federal Government has elected to follow. . . . [T]he Federal Government is entitled in its wisdom to act to permit the States varying degrees of regulatory authority." *Id.* (emphasis in original).

Barclays and *Wardair Canada* teach that, before we can hold that an otherwise constitutional state statute[4] that affects foreign commerce is unconstitutional because it prevents the federal government from speaking with "one voice, " we must examine whether the federal government has *chosen* to permit the states to act. After conducting that examination, we hold that Congress has spoken affirmatively in the area of Holocaust-era insurance policies and has acquiesced in state laws like HVIRA.[5]

In 1998, Congress passed the U.S. Holocaust Assets Commission Act of 1998 (Holocaust Act), Pub. L. 105-186, 112 Stat. 611, as amended Pub. L. 106-155, § 2, 113 Stat. 1740 (1999) (codified at 22 U.S.C. § 1621 note), in order "to establish a commission to examine issues pertaining to the disposition of Holocaust-era assets in the United States . . . and to make recommendations to the President on further action, and for other purposes." Holocaust Act Intro. The Holocaust Act instructs the Commission to "conduct a thorough study and develop a historical record of" certain assets, "if such assets came into the possession or control of the Federal Government." *Id.* § 3(a)(1). The Commissioner and Amicus the State of California argue that § 3(a)(4), which concerns Holocaust-era insurance policies, is relevant to this litigation:

> In carrying out its duties under this Act, the Commission shall take note of the work of the National Association of

---

[4] In both *Barclays* and *Wardair Canada*, the state statute was "otherwise constitutional" because it did not discriminate against interstate commerce, while in the present case HVIRA is "otherwise constitutional" because of the McCarran Act.

[5] A much stronger case for congressional acquiescence exists here than in *Wardair Canada* or *Barclays*. In those cases, the Court inferred congressional acquiescence by negative implication. In the present case, however, we need not draw a negative inference from what Congress did *not* say, but can draw a positive inference from what Congress *did* say in the Holocaust Act.

> Insurance Commissioners with regard to Holocaust-era insurance issues and shall encourage the National Association of Insurance Commissioners to prepare a report on the Holocaust-related claims practices of all insurance companies, both domestic and foreign, doing business in the United States at any time after January 30, 1933, that issued any individual life, health, or property — casualty insurance policy to any individual on any list of Holocaust victims . . . .

Id. § 3(a)(4)(A). The report by the National Association of Insurance Commissioners (NAIC) "should include the following, to the degree the information is available": (1) the number of policies issued by insurance companies to victims of the Holocaust; (2) the value of each policy at the time of issue; (3) the total number of policies, and the dollar amounts, that have been paid out; and (4) the total present-day value of assets in the United States of each company. *Id.* § 3(a)(4)(B). Section 3(a)(3), entitled "Coordination of Activities," states that the Commission "shall, to the maximum extent practicable, coordinate its activities with, and not duplicate similar activities already being undertaken by, private individuals, private entities, or *government entities*, whether *domestic* or foreign." (Emphasis added.) Section 3(b) adds that the Commission "shall review comprehensively any *research* by . . . *non-Federal government entities*, whether *domestic* or foreign." (Emphasis added.)

The Holocaust Act does not refer in so many words to state legislation as a cause of domestic governments' undertaking this "research," § 3(b), nor does it explain what "work" of NAIC the Commission is to take "note" of, § 3(a)(4). There are several reasons, however, why we read the Holocaust Act to embrace state legislation like HVIRA.

NAIC is an organization of insurance regulators from the 50 states. The Holocaust Act asks for detailed information on the Holocaust-related claims practices of "*all insurance companies, both domestic and foreign*, doing business in the United States at any time after January 30, 1933." *Id.* § 3(a)(4)(A) (emphasis added). This information is to include data on individual Holocaust-era policies. *Id.* If Congress was expecting a detailed report on the claims practices and policies of "foreign" insurance companies from an organization consisting only of state insurance regulators, Congress must have expected that the regulators would be acting pursuant to state law. Congress must also have been aware that, in order to fulfill the Holocaust Act's broad objectives, state insurance commissioners might have to require the foreign affiliates of domestic insurance companies to search a foreign office for information on Holocaust-era policies.

Even if Congress' reference to the "work" of NAIC is not, by itself, encouragement of state statutes like HVIRA, Congress was aware that domestic governmental entities were conducting research into the activities of Holocaust-era insurers. As noted, § 3(b) of the Holocaust Act requires the Commission to "review comprehensively any research by . . . *non-Federal government entities*, whether domestic or foreign" (emphasis added), and § 3(a)(3) requires the Commission to "coordinate its activities" with those of domestic governmental entities.

The legislative history of the Holocaust Act supports our conclusion that Congress was aware of the states' efforts to obtain information on Holocaust-era insurance policies. In 1998, there was a flurry of activity in Congress relating to Holocaust-era assets. On February 12, 1998, the House Committee on Banking and Financial Services held a hearing on "The Restitution of Art Objects Seized by the Nazis from Holocaust Victims and Insurance Claims of Certain Holocaust Victims and Their Heirs": Hearing Before the House Comm. on Banking & Fin. Servs., 105th Cong. 131 (Feb. 12, 1998).

State Insurance Commissioners Quackenbush (of California) and Senn (of Washington) testified at that hearing. Commissioner Senn noted that she chaired the NAIC

"Holocaust Insurance Issues Working Group," which was investigating Holocaust-era insurance issues with the help of "state insurance departments." *Id.* 1998 WL 65380. She explained that NAIC had requested voluntary cooperation from the insurance companies but, "if our requests for cooperation are not satisfied, then the states may begin to exercise [regulatory] powers." *Id.* "Congress and the States can work together," Commissioner Senn concluded. *Id.* 105th Cong. at 134. Commissioner Quackenbush added that he had held hearings in California relating to this issue, and he was "prepared to revoke [the] certificate of authority, which allows a company to sell insurance in California, for [any insurance company] and any of its American subsidiaries, if it fails to" provide information on Holocaust-era policies. *Id.* at 142. The Chair of the House committee, Representative Leach, who sponsored the Holocaust Act two months later, noted:

> [L]et me say that because this is an issue of international significance, there are aspects of the American system that are not widely understood abroad, and one relates to the Federal nature of America, particularly in the insurance arena, *the decision of the United States Congress, in effect, either to devolve or not to assume responsibility for basic insurance regulation, which gives the States a significant role. And that means that as two symbolic State insurance commissioners, there's a great deal of authority that resides in your offices.*

Id. at 157 (emphasis added).[6] On the basis of the text, context, and history of the Holocaust Act, we conclude that Congress was aware of the states' involvement in this area and, at least implicitly, encouraged laws like HVIRA.

Notwithstanding the Holocaust Act, Plaintiffs argue, and the district court held, that HVIRA conflicts with a federal

---

[6] Representative Leach submitted a draft of the bill, H.R. 3662, to the House on April 1, 1998. See 1998 Cong. Q. 3662, 105th Cong., 2d Sess.

policy relating to "Holocaust victims compensation efforts" as evidenced by three actions undertaken by the executive branch. They are: (1) the Foundation Agreement between Germany and the United States (Foundation Agreement); (2) the International Commission on Holocaust Era Insurance Claims (ICHEIC); and (3) the Swiss-US Joint Statement. The following is a brief summary of each:

a. *The Foundation Agreement*

In December 1999, the German government and German companies agreed to fund a DM 10 Billion Foundation to settle Nazi-era claims, in exchange for the voluntary dismissal of lawsuits that had been filed against German companies. The German government has agreed to fund the Foundation when all such claims pending in United States courts have been finally dismissed.

On July 17, 2000, the United States and the German government signed the Foundation Agreement. The Agreement recognizes "as legitimate the interest German companies have in all-embracing and enduring legal peace." It also states that "it would be in the interests of both parties for the Foundation to be the exclusive remedy and forum for addressing all claims[] that have been or may be asserted against German companies" arising from Nazi-era activities. Foundation Agreement at 2, 4.

The United States, in Article 2 of the Foundation Agreement, agreed to the following in pertinent part:

> (1) The United States shall, in all cases in which the United States is notified that a claim described in article 1 (1) has been asserted in a court in the United States, inform its courts through a Statement of Interest . . . that it would be in the foreign policy interests of the United States for the Foundation to be the exclusive remedy and forum for resolving such claims asserted against German companies

> . . . and that dismissal of such cases would be in its foreign policy interest.
>
> (2) The United States, recognizing the importance of the objectives of this agreement, including all-embracing and enduring legal peace, shall, in a timely manner, use its best efforts, in a manner it considers appropriate, to achieve these objectives with state and local governments.

Annex B of the Foundation Agreement explains that the United States will "recommend dismissal" of lawsuits "on any valid legal ground." Paragraph seven of Annex B recognizes, however, that the "United States does not suggest that its policy interests concerning the Foundation in themselves provide an independent legal basis for dismissal, but will reinforce the point that U.S. policy interests favor dismissal on any valid legal ground."

b. *The ICHEIC*

The ICHEIC was established in 1998 by NAIC in cooperation with several European insurance companies, European regulators, representatives of nongovernmental organizations, and the State of Israel. The United States has the status of an "observer." The ICHEIC is a voluntary, private organization that was created with the goal of implementing a "just process . . . that will expeditiously address the issue of unpaid [Holocaust-era] insurance policies." The ICHEIC creates an "International Commission" that is charged with initiating an "investigatory process to determine the current status of those insurance policies . . . for which claims are filed." To assess the remaining unpaid insurance policies of Holocaust victims, "a reasonable review will be made of the participating companies' files."

c. *The Swiss-US Joint Statement*

At the inaugural meeting of the Swiss-US Joint Economic Commission in January 2000, the two countries issued a Joint Statement stating that they "have decided to endow their

partnership with a long-lasting perspective, through continued and institutionalized dialogue." Section 2.4(b) of an "Action Plan" annexed to the Joint Statement notes that many Swiss insurance companies have settled insurance lawsuits, and "U.S. authorities will call on the U.S. State insurance Commissioners and State legislative bodies to refrain from taking unwarranted investigative initiatives or from threatening or actually using sanctions against Swiss insurers."

We next consider the effect of those three actions on the validity of HVIRA. Significantly, Plaintiffs do not argue that HVIRA is preempted by any of the three. Instead, Plaintiffs claim that the three actions simply are evidence of a foreign policy with which HVIRA conflicts. We are not persuaded.

First, we question whether there is in fact any policy conflict between HVIRA, the enactment of which Congress encouraged in the federal Holocaust Act, and the executive branch initiatives. HVIRA seeks information for two main purposes: enabling victims of the Holocaust to know whether they have insurance claims, and protecting Californians from insurers that have not paid valid claims. The second purpose conflicts with no federal policy of which we are aware. The first is consistent with the overall goal of the three initiatives: to resolve Holocaust-era claims. In other words, the Holocaust Act, HVIRA, and the executive branch initiatives share the same policy objective, although they seek to achieve that policy objective by varying techniques.

Second, we note that two of the executive branch initiatives are country-specific. The German Foundation Agreement pertains to German insurers. The Swiss-US Joint Statement pertains to Swiss insurers. That being so, neither of those initiatives governs with respect to Generali (an Italian insurer) or Winterthur (which apparently has affiliates throughout Europe).

Third, as Plaintiffs concede, none of the three initiatives has preemptive effect. The German Foundation Agreement

mentions the United States' interest in the *voluntary* dismissal of lawsuits against German corporations and, by its terms, "does not suggest that [the United States'] policy interests concerning the Foundation in themselves provide an independent legal basis for dismissal" of any lawsuit. Foundation Agreement, Annex B, P 7. The ICHEIC is not an official executive branch action at all; it is a *voluntary, private* organization in which the United States has the role of a mere observer.

Of the three, only the Swiss-US Joint Statement refers specifically to a policy on gathering information about Holocaust-era insurance policies: the executive branch "will call on the U.S. State insurance Commissioners and State legislative bodies to refrain from taking unwarranted investigative initiatives or from threatening or actually using sanctions against Swiss insurers." Swiss-US Joint Statement, Action Plan § 2.4(b). That is hortatory, not mandatory, wording. But even if we were to assume that a conflict exists between the Holocaust Act and the Swiss-US Joint Statement with regard to seeking information from Swiss insurers,[7] Congress' action controls in this instance. Article I, § 8 of the United States Constitution expressly grants Congress the authority to regulate foreign commerce. Article II, § 2 of the Constitution grants the executive branch the authority, with the consent of the Senate, to make treaties but, as noted, the Swiss-US Joint Statement is not a treaty, and preemption is not an issue here. Plaintiffs' argument that a "policy interest" found in an executive branch "Joint Statement" creating an Economic

[7] It is unclear from the Swiss-US Joint Statement what "investigative initiatives" by "State legislative bodies" are considered to be "*unwarranted*." (Emphasis added.) By implication, states may seek information if the inquiry is "warranted." Arguably, the Holocaust Act is a statement from Congress that statutes like HVIRA are warranted.

Commission trumps Congress' express constitutional authority to regulate foreign commerce is incorrect.[8]

In this connection, Plaintiffs draw our attention to letters in which executive branch officials argue that HVIRA does conflict with the federal government's policy concerning Holocaust-era claims. In *Barclays*, the Supreme Court rejected a similar argument. The plaintiff in *Barclays* had pointed to "a series of Executive Branch actions, statements, and amicus filings . . . that, taken together, . . . constitute a clear federal directive proscribing States' use of worldwide combined reporting." 512 U.S. at 328 (citation and internal quotation marks omitted). The Court held that the executive branch's actions "cannot perform the service for which [the plaintiff] would enlist them. The Constitution expressly grants Congress, not the President, the power to 'regulate Commerce with foreign Nations.'" *Id.* at 328-29 (quoting U.S. Const. art. I, § 8, cl. 3).

In conclusion, the district court erred when it held that Plaintiffs established a likelihood of success on the question whether HVIRA violates the Commerce Clause.

C. *The Foreign Affairs Power*

The district court also held that Plaintiffs established a probability of success on their claim that HVIRA violates the federal government's power over foreign affairs. The court reasoned, and Plaintiffs argue, that HVIRA has more than an "incidental effect on foreign countries" and has the potential to "disrupt and embarrass" the federal government in the field of foreign relations. We disagree as a matter of law.

[8] *Cf.* Louis Henkin, Foreign Affairs and the U.S. Constitution 89 (2d ed. 1996) ("Whatever, then, the President might have authority to do by treaty or other international agreement, he cannot unilaterally regulate commerce with foreign nations . . . .").

1. *Relevant Law*

The federal government's foreign affairs power is not mentioned expressly in the text of the Constitution but, rather, is derived from the structure of the Constitution and the nature of federalism.[9] *See generally* Harold G. Maier, *Preemption of State Law: A Recommended Analysis*, 83 Am. J. Int'l L. 832, 836-37 (1989). The power is rarely invoked by the courts; the Supreme Court has not applied it in more than 30 years, since *Zschernig* v. *Miller*, 389 U.S. 429, 19 L. Ed. 2d 683, 88 S. Ct. 664 (1968).

The plaintiff in *Zschernig* challenged an Oregon probate law that allowed a foreign citizen to inherit from a decedent's estate only if United States citizens could inherit from a decedent's estate in the foreign citizen's country. The Supreme Court had held in *Clark* v. *Allen*, 331 U.S. 503, 517, 91 L. Ed. 1633, 67 S. Ct. 1431 (1947), that a California probate law with a similar reciprocity provision did not, on its face, violate the Constitution, because the statute had only "some incidental or indirect effect in foreign countries." In *Zschernig*, the Court refused to reconsider its facial holding in *Clark*, but held that Oregon's statute, *as applied*, was an unconstitutional "intrusion by the State into the field of foreign affairs which the Constitution entrusts to the President and the Congress." 389 U.S. at 432-33.

The Court in *Zschernig* pointed, with disapproval, to many examples of judges' pontificating on the policies of foreign nations. *Id.* at 433-34. The Court concluded that "the type of probate law that Oregon enforces affects international relations in a persistent and subtle way." *Id.* at 440. The Court observed

---

[9] The foreign affairs power also has been referred to as "dormant foreign relations preemption." Curtis A. Bradley & Jack L, Goldsmith, *Customary International Law as Federal Common Law: A Critique of the Modern Position*, 110 Harv. L. Rev. 815, 864 (1997); *see also* Harold Hongju Koh, *Is International Law Really State Law?*, 111 Harv. L. Rev. 1824, 1847 (1998).

that "'international controversies of the gravest moment, sometimes even leading to war, may arise from real or imagined wrongs to another's subjects inflicted, or permitted, by a government.'" *Id.* at 441 (quoting *Hines* v. *Davidowitz*, 312 U.S. 52, 64, 85 L. Ed. 581, 61 S. Ct. 399 (1941)). Here, of course, we address a facial (*Clark*), not an as-applied (*Zschernig*) challenge.

The parties call our attention to two more recent cases in which other circuit courts have confronted a foreign affairs challenge. In *National Foreign Trade Council* v. *Natsios*, 181 F.3d 38, 51-52 (1st Cir. 1999), the First Circuit held that a Massachusetts law that prohibited state agencies from purchasing goods from companies doing business with a specific country, Burma (the Burma Law), violated the foreign affairs power, the dormant Commerce Clause, and the Supremacy Clause. Notably, the Supreme Court affirmed the First Circuit's ruling that the Burma Law was preempted by federal law under the Supremacy Clause, but the Court did not rule on the foreign affairs question. *Crosby* v. *National Foreign Trade Council*, 530 U.S. 363, 120 S. Ct. 2288, 2294-95 n.8, 147 L. Ed. 2d 352 (2000).

In *Trojan Technologies, Inc.* v. *Pennsylvania*, 916 F.2d 903 (3d Cir. 1990), a Canadian corporation argued that a Pennsylvania "Buy American" law violated the foreign affairs power. The Third Circuit held that the statute did not violate the Commerce Clause, the Supremacy Clause, or the foreign affairs power. The court reasoned that "any state law that involves the state in the actual conduct of foreign affairs is unconstitutional," but "any action that has only some incidental or indirect effect in foreign countries" is not. *Id.* at 913 (citation and internal quotation marks omitted). The court then held that the "Buy American" statute "exhibits none of the dangers attendant on the statute reviewed" in *Zschernig*, because: (1) Pennsylvania's statute provided no opportunity for state officials to comment on the nature of foreign regimes; (2) the Pennsylvania statute, on its face, did not single out any

particular foreign country; (3) there was no evidence that the statute had been applied selectively according to attitudes concerning foreign policy; and (4) there was evidence that Congress had recently directed its attention to "Buy American" statutes, but did not take steps to preempt them.[10] *Id.* at 913-14; *see also* K.S.B. *Technical Sales Corp.* v. *North Jersey Dist. Water Supply Comm'n*, 75 N.J. 272, 381 A.2d 774, 784 (N.J. 1977) (holding that New Jersey's "Buy American" statute did not violate the foreign affairs power because it did not "result demonstrably in a significant and direct impact upon foreign affairs"). *But see Bethlehem Steel Corp.* v. *Board of Comm'rs*, 276 Cal. App. 2d 221, 225-27, 80 Cal. Rptr. 800 (Ct. App. 1969) (holding that a California "Buy American" statute violated the foreign affairs power).

2. *Zschernig Does Not Apply to HVIRA*

We are not persuaded that *Zschernig* applies to HVIRA. In *Zschernig*, the Oregon probate statute violated the foreign affairs power because, *as applied*, it allowed Oregon judges to insult foreign nations. 389 U.S. at 433-35. In *Clark*, the Court held that a similar California statute, *on its face*, did not violate the Constitution. *See Zschernig*, 389 U.S. at 432 (noting that, in *Clark*, the Court held that "a general reciprocity clause did not on its face intrude on the federal domain"). HVIRA regulates insurance companies that do business in California and are, or are related to, companies that issued Holocaust-era insurance policies. No Plaintiff is a foreign government, nor is any Plaintiff owned in whole or in part by a foreign government; they are, simply, businesses. Unlike the statute considered in *Natsios*, HVIRA does not refer to any particular country. As in *Trojan*, there is no evidence that HVIRA would be applied in a way that would implicate the diplomatic concerns mentioned in *Zschernig*.

---

[10] The *Trojan* court's fourth reason echoes the reasoning of the foreign commerce cases, *Barclays* and *Wardair Canada*, discussed, in Part B(3), above.

Because *Zschernig* has been applied so sparingly, because *Clark* remains intact, and because the Supreme Court's foreign commerce cases have taken a different approach (as we discussed above), we hesitate to apply *Zschernig* to a facial challenge to state statutes involving "foreign affairs" (a) but that mainly involve foreign commerce and (b) that are not directed at a particular country. HVIRA, on its face, involves commerce alone, and it is not, on its face, directed at any particular foreign country. For those reasons, we conclude that *Zschernig* does not govern.

D. *The Due Process Clause Claim*

Plaintiffs Generali and Winterthur argue that HVIRA violates the "legislative prong" of the Due Process Clause, which "limits the power of a forum state to apply its substantive law to factual and legal situations with which it has little or no contact." Additionally, Winterthur argues that HVIRA "violates the most basic notions of fundamental fairness " because it takes "away the licenses of California insurers for failure to perform tasks that are literally impossible." Moreover, Winterthur asserts, the reporting requirement is "arbitrary and irrational."

Plaintiffs cite a recent case, *Gerling Global Reins. Corp.* v. *Nelson*, 123 F. Supp. 2d 1298, 1303-04 (N.D. Fla. 2000), in which the District Court for the Northern District of Florida held that a Florida Holocaust-era insurance statute violates the legislative prong of the Due Process Clause. The court noted that, under Eleventh Circuit precedent, there must be "'some minimal contact between a State and the regulated subject before it can, consistently with the requirements of due process, exercise legislative jurisdiction.'" *Id.* at 1301 (quoting *American Charities for Reasonable Fundraising Reg., Inc.* v. *Pinellas County*, 221 F.3d 1211, 1216 (11th Cir. 2000)).

It is possible that HVIRA violates the Due Process Clause, but the district court did not reach that issue, and it is not fully developed in the record or in the briefs presented to this court.

We leave the preliminary injunction in place in order to give the district court an opportunity to consider whether Plaintiffs are likely to succeed on the merits.[11] (Defendant does not challenge the district court's conclusion that Plaintiffs established a likelihood of irreparable harm; they may lose the right to continue to do business in California if the statute takes effect.)

CONCLUSION

We hold that the district court erred when it decided that HVIRA violates the dormant Commerce Clause and the foreign affairs power. However, because the district court has not addressed Plaintiffs' claim that HVIRA violates the Due Process Clause, we leave the preliminary injunction in place and remand for further proceedings.

Preliminary injunction AFFIRMED; REMANDED for further proceedings.

---

[11] Defendant acknowledged at oral argument that a serious question may exist concerning HVIRA and the Due Process Clause. When questioned about whether HVIRA requires that the Commissioner suspend the license of a California insurer who is unable to produce the information required by HVIRA, either because of European privacy laws or because the company has no control over the information, counsel stated that HVIRA requires the suspension of the license nonetheless. Counsel then said that the issue "is really a due process issue" and that any evidence of a company's inability to produce information should be evaluated "as part of a due process analysis, and that's where we think that issue properly lies."

APPENDIX C

GERLING GLOBAL REINSURANCE CORP. OF AMERICA, et al., Plaintiffs, v. HARRY LOW, in his capacity as the INSURANCE COMMISSIONER OF THE STATE OF CALIFORNIA, *Defendant*.

No. CIV. S-00-0506 WBS JFM Consolidated Cases: No. CIV. S-00-0613 WBS JFM, No. CIV. S-00-0779 WBS JFM, No. CIV. S-00-0875 WBS JFM

UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF CALIFORNIA

October 1, 2001, Decided

October 2, 2001, Filed

MEMORANDUM AND ORDER

In October 1999, California enacted the Holocaust Victim Insurance Relief Act ("HVIRA"). *See* Cal. Ins. Code §§ 13800-13807 and accompanying regulations, Cal. Code Regs. Tit. 10 §§ 2278-2278.5. HVIRA relates to claims asserted by Holocaust victims or their heirs or beneficiaries for coverage under insurance policies issued in Europe between 1920 and 1945. The stated purpose of HVIRA is to ensure that insurance companies doing business in the State of California disclose to the state "any involvement they or their related companies may have had with insurance policies of Holocaust victims." Cal. Ins. Code § 13801(e). HVIRA further declares that insurers in California have a responsibility to "ensure the rapid resolution of these questions [regarding unpaid Holocaust-era insurance policies], eliminating further victimization of these policyholders and their families." *Id.*

After briefing and a hearing regarding various constitutional challenges to the statute, this court found, in June

of 2000, that plaintiffs had shown a probability of success on the merits of two of their claims: (1) that HVIRA interferes with the federal government's control over foreign affairs; and (2) that HVIRA violates the Commerce Clause, and therefore granted a preliminary injunction enjoining enforcement of the statute. The Ninth Circuit reversed the holdings upon which that injunction was based, but left the injunction in place, specifically referencing the "possibility" that HVIRA violates the Due Process Clause. *Gerling Global Reins. Corp. of Am. v. Low*, 240 F.3d 739, 754 (9th Cir. 2001), *petition for cert. filed* (U.S. June 26, 2001) (No. 00-1926).

The matter is now before this court on the parties' cross motions for summary judgment. All plaintiffs jointly move for summary judgment on the grounds that HVIRA violates the Due Process Clause because: (1) it is an extraterritorial regulation enacted in excess of California's legislative jurisdiction; and (2) it mandates the performance of impossible tasks and provides for automatic license revocation upon non-performance. Defendant moves for summary judgment, and for the preliminary injunction to be dissolved, on the grounds that: (1) the Ninth Circuit's decision precludes any claim that HVIRA violates either the Foreign Affairs Power or the Commerce Clause; (2) HVIRA does not violate the Due Process Clause; and (3) HVIRA is not unconstitutional for any other reason raised in any plaintiff's complaint.

I. *Facts*

A. *The Statutory Framework*

After the National Socialist (NAZI) party came to power in Germany, it enacted a series of statutes authorizing governmental confiscation of Jewish property and other assets. These laws included insurance proceeds among the types of property that the government was authorized to seize from Jews. Under the NAZI statutes, German insurers were required to pay the proceeds of insurance policies of Jewish residents to "blocked accounts" controlled by the NAZI government. A

1943 statute also ordered confiscation of the estates of deceased Jews. Furthermore, although many Holocaust victims had insurance policies, many lost the papers during their imprisonment. In many cases, the persons most knowledgeable about the policy were killed, leaving heirs without a paper trail. As a result, many Holocaust victims and their descendants and heirs have never collected on their insurance policies.

HVIRA requires insurance companies doing business in California to file reports disclosing policies issued in Europe during the period 1920-1945. *See* Cal. Ins. Code §§ 13800-13807. Other enabling statutes extend the statute of limitations for filing such claims (Cal. Civ. Proc. Code § 354.5), and provide procedures for the suspension of licenses of insurance companies who have not paid valid claims (Cal. Ins. Code § 790.15).[1]

B. *The Challenged Statute: California Insurance Code § § 13800-13807 ("HVIRA")*

HVIRA obligates insurers doing business in California to file reports identifying insurance policies (life, property, liability, health, annuities, dowry, educational, or casualty) sold to persons in Europe between 1920 and 1945 directly or through a "related company." Cal. Ins. Code § 13804(a). A "related company" is defined as "any parent, subsidiary, reinsurer, successor in interest, managing general agent, or affiliate company of the insurer." Cal. Ins. Code § 13802(b).

Specifically, the statute requires the insurer or related company to file with the registry: (1) the number of those insurance policies; (2) the holder, beneficiary, and current status of those policies; and (3) the city of origin, domicile, or address for each policy holder. Cal. Ins. Code § 13804(a). Filing false information under this section is punishable by civil

---

[1] Defendant's motion to dismiss plaintiffs' constitutional challenges to Cal. Civ. Proc. Code § 354.5(c) and Cal. Ins. Code § 790.15(c) for lack of standing was granted in June of 2000.

penalties of up to $ 5,000.00 per policy.

Further, with regard to each policy, the insurer must certify one of the following: (1) that the proceeds of the policies have been paid to the designated beneficiaries or their heirs where that person or persons, after diligent search, could be located and identified; (2) that the proceeds where the beneficiaries or heirs could not, after diligent search, be located or identified, have been distributed to Holocaust survivors or to qualified charitable nonprofit organizations for the purpose of assisting Holocaust survivors; (3) that a court of law has certified in a legal proceeding resolving the rights of unpaid policyholders, their heirs, and beneficiaries, a plan for the distribution of the proceeds; or (4) that the proceeds have not been distributed and the amount of those proceeds. Cal. Ins. Code § 13804(b).[2]

The statute also directs that, if the reports are not filed by the 210th day after the HVIRA becomes effective, the Commissioner "*shall* suspend the certificate of authority to conduct insurance business in the state . . . ." Cal. Ins. Code § 13806. (emphasis added).

C. *The Parties*

Defendant is Harry Low in his capacity as the Commissioner of Insurance of the State of California. Plaintiffs are insurance companies licensed to do business in California. Four sets of plaintiffs originally filed separate complaints against then-Insurance-Commissioner Chuck Quackenbush. Those cases were consolidated as the present action and the plaintiffs now move jointly.

---

[2] The term "proceeds" is defined in the statute as "the face value or other payout of insurance policies and annuities plus reasonable interest to date of payment without dimunition for wartime or immediate postwar currency devaluation." Cal. Ins. Code § 13802(c).

1. *Gerling Global Reinsurance Corporation of America ("the Gerling plaintiffs")*

The Gerling plaintiffs are five insurance companies licensed to do business in California. They are "related to" or "affiliated" with two German companies (Gerling-Konzern Allgemenine Versicherungs-AG ("GKA") and Gerling-Konzern Lebensversicherungs-AG ("GKL") that issued policies in Europe during the proscribed time period.

GKA and GKL do not conduct any business in the State of California either directly or through the Gerling plaintiffs. None of the Gerling plaintiffs is in possession, custody or control of records pertaining to any insurance policies in force in Europe at any time between 1920 and 1945. Further, the Gerling plaintiffs contend that they have no means to compel such information from their German affiliates. GKA and GKL believe that if they produce the information demanded by the HVIRA, they will face criminal and civil penalties under German law.[3]

2. *American Insurance Association and American Re-Insurance Co. (the "American plaintiffs")*

The American plaintiffs are American Insurance Association ("AIA") and American Reinsurance Company ("AmRe"). AIA is a national trade association of insurers, some of whom do business in California. AIA principally represents American insurance companies that did not issue insurance policies in Europe during the relevant period and do not own or control any companies that did.[4] Several members of AIA are, however, "related to" European companies that issued policies

---

[3] The parties have submitted competing expert declarations reaching differing conclusions as to whether German privacy law actually does preclude the HVIRA-mandated disclosures.

[4] American Insurance does represent Assicurazioni Generali, a European Company discussed separately herein.

during the relevant time period. AIA's affected members contend that they lack the corporate authority to compel their related European companies to produce the information required by the HVIRA. Further, plaintiffs believe that the law of the related European company's country forbids the disclosure of the kind of information required by HVIRA.

AmRe is a large insurance company licensed to do business in California. Neither AmRe, nor any subsidiary or affiliate over which it has control, issued insurance policies that were in effect in Europe from 1920 to 1945. AmRe is subject to the HVIRA's reporting requirements because it is "related," through its parent corporation, Munich Re, to two European insurers that issued insurance policies in Europe from 1920 to 1945. AmRe contends that neither AmRe nor Munich Re has the corporate authority to compel these European companies to produce the information required by the HVIRA. Further, according to AmRe, Munich Re believes it would have to violate German law in order to comply with HVIRA.

3. *Winterthur International American Insurance Co., et al. ("the Winterthur plaintiffs")*

The Winterthur plaintiffs are nine insurance companies licensed to do business in California. None of the companies ever issued insurance policies in Europe during the applicable time period, though each is "related" to such a company. Each plaintiff claims, however, that it is not in possession, custody, or control of any records pertaining to insurance companies [sic] sold by "related companies." Further, the Winterthur plaintiffs contend that they lack the corporate authority to compel the production of the information required by the HVIRA. They also believe that to do so would violate European law.

4. *Assicurazioni Generali, S.p.A. ("Generali")*

Generali is an Italian corporation licensed to do business in California. It issued insurance policies in Europe during the applicable time period. The policies in question were issued in

Europe to European insureds. According to Generali, these policies typically incorporated terms and conditions regulated by the laws of the country of issuance. For example, local laws "typically" required that reserves earmarked for these policies were to be maintained in the country of issuance and invested locally. (Carnicelli Decl. P 3.). Apparently, some of the policies also included forum selection clauses requiring that disputes be heard in the country of issuance.

Though Generali cannot make the argument that it lacks the corporate authority to obtain the information necessary to comply with HVIRA, it has joined the joint motion arguing that making those disclosures would violate German law and subject the company to criminal and civil penalties.

D. *Defendant's Enforcement and Interpretation of the HVIRA Statutory and Regulatory Scheme*

1. *Prior to the Preliminary Injunction*

Prior to the issuance of the preliminary injunction, then-Commissioner Chuck Quackenbush actively threatened enforcement against all plaintiffs. He subpoenaed many insurance companies, including plaintiffs and those represented by plaintiffs, to appear at a hearing on December 1, 1999. At that hearing, Quackenbush informed the insurance companies, "this issue will be resolved in California. I promised that for the last two years. And on April 6th, you're going to see just how serious California is if you have not complied with this law." (Agel Decl., Ex. 18, Transcript of December 1, 1999 Investigatory Hearing, 14:16-20). He told Generali specifically, "I want you to take back to your officers in Italy and everywhere else, that you might want to consider seriously leaving the State, because it's obvious to me right now that you have no intention of complying with the law." (Agel Decl., Ex. 18, 49:12-16). At the end of questioning Generali, Quackenbush stated generally, "it is your choice now whether you're going to work with this Department of Insurance to bring your company in full compliance, whether you're going

to leave the state voluntarily, or whether I'm going to kick you out. That's your three choices." (Agel Decl., Ex. 18, 51:19-23).

The preliminary injunction has prevented any such action as of yet. Meanwhile, there has been a change of leadership at the Department of Insurance, and plaintiffs have taken discovery regarding the manner in which the Department interprets and would implement HVIRA.

2. *Since the Preliminary Injunction*

Leslie Tick, a senior counsel at the California Department of Insurance who is responsible for administering HVIRA, gave deposition testimony in this case as the Department's spokesperson on July 5, 2001. She testified that the only defense to non-compliance with HVIRA's reporting requirements is that the required documents do not exist. Failure to comply for any other reason, including lack of the corporate authority to compel production of the information or a belief that doing so would violate applicable European law, will trigger a license suspension action. (Agel Decl., Ex. 17, Tick Depo. at 227:9-238:17, 252:13-266:16).

Under questioning as to how HVIRA's mandatory suspension provision would be carried out by the Department, Ms. Tick further testified that a license suspension proceeding would involve a hearing before an administrative law judge to determine whether the insurer had complied with the statute. The judge would not, however, be able to exercise any discretion in his determination depending on whether the insurer was participating in good faith in ICHEIC, or whether the insurer could show that it did not control the information sought by HVIRA, or whether it could show that it or its affiliates were barred from producing the information by European privacy laws. *Id.* at 175:5-176:13.

II. *The Standard*

The court must grant summary judgment to a moving party "if the pleadings, depositions, answers to interrogatories, and

admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(c). The party adverse to a motion for summary judgment may not simply deny generally the pleadings of the movant; the adverse party must designate "specific facts showing that there is a genuine issue for trial." Fed. R. Civ. P. 56(e); *Celotex Corp. v. Catrett*, 477 U.S. 317, 91 L. Ed. 2d 265, 106 S. Ct. 2548 (1986). Simply put, "a summary judgment motion cannot be defeated by relying solely on conclusory allegations unsupported by factual data." *Taylor v. List*, 880 F.2d 1040, 1045 (9th Cir. 1989). The non-moving party must show more than a mere "metaphysical doubt" as to the material facts. *Matsushita Elec. Indus. Co. v. Zenith Radio*, 475 U.S. 574, 587, 89 L. Ed. 2d 538, 106 S. Ct. 1348 (1986).

III. *Plaintiffs' Joint Motion for Summary Judgment*

Plaintiffs jointly move for summary judgment on the ground that HVIRA is an unconstitutional violation of the Due Process Clause of the U.S. Constitution.

A. *Law of the Case Doctrine*

The parties dispute both the meaning and effect of the Ninth Circuit's decision in *Gerling v. Low*, 240 F.3d 739 (9th Cir. 2001). As a threshold matter, it must be determined what issues are now properly before this court.

Defendant contends that the Ninth Circuit's *Gerling v. Low* opinion "effectively disposes of" all of plaintiffs' claims. Defendant argues: (1) that the Ninth Circuit's ruling finally disposes of plaintiffs' Commerce Clause and Foreign Affairs Power arguments; and (2) that the following language from the opinion precludes any argument that the statute regulates extraterritorially because it is controlling under the "law of the case" doctrine: "HVIRA is a California insurance regulation of California insurance companies . . . [and] does not regulate foreign insurance policies, or control the substantive conduct of a foreign insurer, or otherwise affect the 'business of insurance'

in any other country." *Id.* at 746.

Under the "law of the case" doctrine a decision of the court in a prior appeal must be followed in all subsequent proceedings in the same case. *Eichman v. Fotomat Corporation*, 880 F.2d 149, 157, (citing *Waggoner v. Dallaire*, 767 F.2d 589, 593 (9th Cir. 1985)), *cert. denied*, 475 U.S. 1064, 89 L. Ed. 2d 601, 106 S. Ct. 1374 (1986). This rule applies unless the first decision is clearly erroneous and would result in manifest injustice, an intervening change in the law has occurred, or the evidence on remand is substantially different. *Id.* It applies even where the first panel's holding was "cryptic and somewhat ambiguous." *Hanna Boys Ctr. v. Miller*, 853 F.2d 682, 687 (9th Cir. 1988); *see also Christianson v. Colt Indus. Operating Corp.*, 486 U.S. 800, 817, 100 L. Ed. 2d 811, 108 S. Ct. 2166 (1988) (the relevant inquiry on a law of the case question is whether a court previously decided an issue, not whether, or how well it explained the decision); and *Leslie Salt Co. v. United States*, 55 F.3d 1388, 1392 (9th Cir. 1995) (even issues treated summarily, without detailed explanation or analysis, become the law of the case).

While affirming this court's grant of plaintiffs' motion for a preliminary injunction, the Ninth Circuit ruled as follows:

> We hold that the district court erred when it decided that HVIRA violates the dormant Commerce Clause and the foreign affairs power. However, because the district court has not addressed Plaintiffs' claim that HVIRA violates the Due Process Clause, we leave the preliminary injunction in place and remand for further proceedings.

Gerling v. Low, 240 F.3d at 754.

As for the question of which legal issues remain open, the Court of Appeals in this case was quite explicit. It unambiguously intended to close the questions of HVIRA's constitutionality under the Commerce Clause or Foreign Affairs Power, but, just as clearly, it intended to leave open the

question of whether the statute violates the Due Process Clause.

Defendant cites *Eichman*, 880 F.2d at 157, for the proposition that the law of the case doctrine encompasses both "a court's explicit decisions" and those "decided by necessary implication" and therefrom argues that the Ninth Circuit's prior ruling disposes of all of plaintiffs' claims, including the Due Process claims. Given its affirmation of the preliminary injunction and the specific language of its remand, the Ninth Circuit's opinion in this case cannot reasonably be read to "necessarily imply" that plaintiffs' due process claims are foreclosed.

For their part, plaintiffs contend that the Ninth Circuit's legal rulings should be given no weight at all on summary judgment because plaintiffs' pending Supreme Court certiorari petition renders the Commerce Clause and Foreign Affairs Power arguments unripe for decision. Plaintiffs argue that "no purpose would be served by entering judgment on these claims, only to have the Supreme Court grant certiorari in October and reverse the Ninth Circuit on the merits." This court, however, is bound by existing rulings of the Ninth Circuit unless and until they are withdrawn or overturned; justice is not served by the type of speculative delay plaintiffs advocate.

Defendant's argument that certain factual findings are also the law of the case requires a slightly different analysis. Defendant's argument focuses on the Ninth Circuit's finding that HVIRA does not regulate foreign insurance policies, control the conduct of foreign insurers, or otherwise affect the "business of insurance" in foreign countries. *Gerling v. Low*, 240 F.3d at 746. This was a factual finding made in a "foreign commerce" context during an interlocutory appeal of a preliminary injunction. Findings on interlocutory appeals of preliminary injunctions do not generally constitute "law of the case". *City of Angoon v. Hodel*, 803 F.2d 1016, 1024 n.4 (9th Cir. 1986) (citations omitted).

The basis for distinguishing between factual findings made

on direct appeal and factual findings made on interlocutory appeal of a preliminary injunction is that "the standard of review for factual determinations on direct appeal is higher than the standard applied during an interlocutory appeal of a preliminary injunction." *Royal Insurance Co. v. Quinn-L Capital Corp.*, 3 F.3d 877, 881 (5th Cir. 1993). Where, as here, a factual finding (i.e., that a statute regulates foreign conduct) did not survive the lower standard of review, it is arguably unlikely that the same or similar finding would have survived or will survive the higher standard of review applied by the same court on direct appeal. This reasoning weighs in favor of applying the law of the case doctrine to all of the Court of Appeals' findings.

There are, however, likely to be contextual distinctions when a proposed factual finding is analyzed under or applied to disparate constitutional claims. Consequently, this court does not read the Ninth Circuit's opinion in this case to preclude plaintiffs from arguing that HVIRA regulates extraterritorially for the purposes of making their due process arguments. No aspect of plaintiffs' due process argument is now foreclosed by the "law of the case" doctrine.

B. *Due Process*

The Ninth Circuit left the preliminary injunction in place and specifically remanded to this court for consideration of the constitutionality of HVIRA under the Due Process Clause. All plaintiffs now challenge the statute on two due process grounds: (1) that it is an extraterritorial regulation enacted in excess of the state's legislative jurisdiction; and (2) that it mandates the performance of impossible tasks and provides for automatic license revocation upon non-performance.

1. *Whether HVIRA Violates Due Process Because it Was Enacted in Excess of California's Legislative Jurisdiction*

Plaintiffs argue that HVIRA violates the Due Process Clause because it was enacted in excess of California's

legislative jurisdiction. Defendant counters that, as a mere "licensing and reporting statute," HVIRA is a proper exercise of California's legislative jurisdiction.[5]

"Legislative jurisdiction" is a concept that courts have applied to describe the due process limits on the legislative power of a state. It is a concept employed to "determine the extraterritorial reach of a statute." *Adventure Communications Inc. v. Kentucky Registry of Election Finance*, 191 F.3d 429, 435 (4th Cir. 1999) (quoting *Hartford Fire Ins. Co. v. California*, 509 U.S. 764, 813, 125 L. Ed. 2d 612, 113 S. Ct. 2891 (1993) (Scalia, J., dissenting)). Like other jurisdictional doctrines, legislative jurisdiction is a threshold question. Applying guidelines similar to those used to determine personal jurisdiction, it requires that a state must have a significant contact or significant aggregation of contacts, creating state interests, such that application of its law is neither "arbitrary nor fundamentally unfair." *Adventure Communications*, 191 F.3d at 436-37 (citing *Allstate Ins. Co. v. Hague*, 449 U.S. 302, 312-13, 66 L. Ed. 2d 521, 101 S. Ct. 633 (1981)).

While noting that "it is possible that HVIRA violates the Due Process Clause," the Ninth Circuit made specific reference to *Gerling Global Reins. v. Nelson*, 123 F. Supp. 2d 1298 (N.D. Fla. 2000), a recent Florida district court case that invalidated a Holocaust-era insurance statute on legislative jurisdiction grounds. The distinctions between Florida's statute and California's HVIRA are illustrative of the purpose and effect of the legislative jurisdiction doctrine.

Florida's "Holocaust Victims Insurance Act," § 626.943, Fla. Stat. (1999), like California's HVIRA, requires insurers doing business in Florida to provide extensive information to

---

[5] Plaintiffs [sic] also argue that "since the HVIRA does not regulate extraterritorially, plaintiff's legislative jurisdiction claims fail as a matter of law." For reasons discussed above, however, the court rejects defendant's contention that plaintiffs' legislative jurisdiction arguments are precluded by the law of the case doctrine.

the Florida Department of Insurance regarding policies issued to Holocaust victims by the insurers themselves or by any "parent, subsidiary, or affiliated company." § 626.9543(3)(d) & (7), Fla. Stat. (1999). The Florida statute also requires, however, that insurers actually pay claims on those policies, if such claims are established under a "reasonable, not unduly restrictive, standard of proof." § 626.9543(5)(b), Fla. Stat. (1999). Moreover, through its implementing regulations, it requires insurers doing business in Florida to pay not only their own claims but also to pay claims against any parent, subsidiary or corporate affiliate. *See* Rule 4-137.010(6), Fla. Admin. Code.

The Florida statute plainly attempted to exercise jurisdiction over the specific enforcement of European insurance contracts. In fact, the Florida Insurance Commissioner did not even try to justify the statute as a "means of determining whether plaintiffs themselves or their officers are fit to engage in the business of insurance in Florida," but instead acknowledged to the Nelson court that the statute's goal was to "bring about payment of amounts due." *Nelson*, 123 F. Supp. 2d 1298, 1303 n.9. Not surprisingly, the Nelson court held that "the efforts of the State of Florida to reach transactions entered in Germany between German parties having no connection with Florida are beyond the state's jurisdiction." *Id.* at 1304.

Plaintiffs in this case argue that "similar legislative findings" preceded enactment of the California and Florida statutes. Those similarities, however, do not overcome the differences in the actual language and effect of the two statutes. Florida's statute is a far more direct attempt to "regulate extraterritorially," as contemplated by the legislative jurisdiction doctrine, than is HVIRA. Most notably, HVIRA lacks any mandate requiring insurers to actually pay claims. Plaintiffs have not established that HVIRA violates due process because it was enacted in excess of the state's legislative jurisdiction. Plaintiffs' motion for summary judgment on that

ground must therefore be denied.

2. *Whether HVIRA Violates Due Process Because it Mandates the Performance of Impossible Tasks and Provides for Automatic License Revocation upon Non-Performance*

   a. *Whether a license to do business as an insurer is a protected property interest for purposes of a Fourteenth Amendment analysis.*

The "threshold requirement to a substantive or procedural due process claim is the plaintiff's showing of a liberty or property interest protected by the Constitution." *Board of Regents v. Roth*, 408 U.S. 564, 569, 33 L. Ed. 2d 548, 92 S. Ct. 2701 (1972); *Wedges/Ledges of Cal., Inc. v. City of Phoenix*, 24 F.3d 56, 62 (9th Cir. 1994); *Kraft v. Jacka*, 872 F.2d 862, 866 (9th Cir. 1989). Courts have long wrestled with the question of exactly what "interests" the Fourteenth Amendment protects. Trying to define the constitutional concepts of "property interest" and "due process," early U.S. Supreme Court decisions looked back as far as the signing of the Magna Carta, "when the great barons of England wrung from King John, at the point of the sword, the concession that neither their lives nor their property should be disposed of by the crown." *Davidson v. New Orleans*, 96 U.S. 97, 102, 24 L. Ed. 616 (1877). More recently, we have recognized that our definition of a Fourteenth-Amendment-protected property interest is rooted in the idea that our property interests provide our "sources of security." *See Goldberg v. Kelly*, 397 U.S. 254, 263 n.8, 25 L. Ed. 2d 287, 90 S. Ct. 1011 (1970) (quoting Reich, *Individual Rights and Social Welfare: The Emerging Legal Issues*, 74 Yale L.J. 1245, 1255 (1965)).

For decades now, courts have recognized protected property interests in many forms which fall outside the norm of common-law property. *See e.g. Mathews v. Eldridge*, 424 U.S. 319, 47 L. Ed. 2d 18, 96 S. Ct. 893 (1976) (individual's interest

in continued receipt of social security benefits is a statutorily-created property interest for purposes of a due process analysis); and *Florida Prepaid Postsecondary Education Expense Board v. College Savings Bank*, 527 U.S. 627, 144 L. Ed. 2d 575, 119 S. Ct. 2199 (1999) (the rights of a party under a patent are a protected property interest for purposes of a due process analysis). Indeed, the Supreme Court has made it abundantly clear that "the property interests protected by due process extend well beyond actual ownership of real estate, chattels, or money." *Roth*, 408 U.S. at 571-72 (citing *Connell v. Higginbotham*, 403 U.S. 207, 208, 29 L. Ed. 2d 418, 91 S. Ct. 1772 (1971)).

Courts have also long recognized that licenses which enable one to pursue a profession or earn a livelihood are protected property interests for purposes of a Fourteenth Amendment analysis. "Once licenses are issued . . . their continued possession may become essential in the pursuit of a livelihood. Suspension of issued licenses thus involves state action that adjudicates important interests of the licensees. In such cases the licenses are not to be taken away without that procedural due process required by the Fourteenth Amendment." *Bell v. Burson*, 402 U.S. 535, 29 L. Ed. 2d 90, 91 S. Ct. 1586 (1971) (addressing suspension of drivers' licenses). The Ninth Circuit has specifically recognized that an existing license, in contrast to an applied-for license, constitutes a legitimate entitlement of which one cannot be deprived without due process. *See Greenwood v. Federal Aviation Administration*, 28 F.3d 971, 975 (9th Cir. 1994) (addressing suspension of pilot's license).

The Commissioner nonetheless advances the argument that doing business as an insurer in California is a "mere privilege" which, he argues, can be summarily withdrawn for "any legitimate reason" the State chooses, divines or fashions. Categorizing plaintiffs' licenses as "privileges" bestowed by the state does not immunize their suspension from a due process challenge. The Supreme Court has specifically

"rejected the concept that constitutional rights turn upon whether a government benefit is characterized as a 'right' or as a 'privilege'." *Graham v. Richardson*, 403 U.S. 365, 374, 29 L. Ed. 2d 534, 91 S. Ct. 1848 (1971). An existing license to do business as an insurer in California is a property interest deserving of Fourteenth Amendment protection. Any action to suspend such a license must therefore be taken in conformity with the requirements of procedural due process.

b. Ripeness of plaintiff's procedural due process challenge

"Ripeness is peculiarly a question of timing." *Thomas v. Union Carbide Agric. Prod. Co.*, 473 U.S. 568, 580, 87 L. Ed. 2d 409, 105 S. Ct. 3325 (1985). "Its basic rationale is to prevent the courts, through premature adjudication, from entangling themselves in abstract disagreements." *Id.* In considering whether a case is ripe for review, a court must evaluate (1) the fitness of the issues for judicial decision and (2) the hardship to the parties of withholding court consideration. *Winter v. California Med. Review, Inc.*, 900 F.2d 1322, 1325 (9th Cir. 1990).

"The critical question concerning fitness for review is whether the claim involves uncertain and contingent events that may not occur as anticipated or may not occur at all." 15 Moore's Fed. Practice, § 101.76[1][a] (3d ed. 1999); *see also Union Carbide*, 473 U.S. at 580-81 (noting that a central component of the fitness for review factor is whether the motion involves uncertain or contingent future events that may never occur.) Though a procedural due process challenge here might theoretically be susceptible to the argument that it will not ripen until plaintiffs have actually been deprived of their protected property interest (i.e. until the Commissioner has made a final determination that plaintiffs' licenses should be suspended), the record in this case is now developed to the point that no legitimately unknown contingencies exist.

As for the second factor under *Winter*, all parties in this

case will suffer hardship if determination of the constitutionality of HVIRA is further delayed. Plaintiffs, in particular, know with absolute certainty that, if HVIRA takes effect, suspension of their licenses to do business as insurance companies in California will follow forthwith. Waiting for this harm to be suffered, not only by the companies themselves, but by all the citizens of California who are their customers and employees, serves no one. The court therefore concludes that the case is ripe for, and justice is best served by, a present determination of whether HVIRA survives a procedural due process challenge.

c. Procedural due process's meaningful hearing requirement

The court therefore turns to the question of whether HVIRA's procedures provide due process. "A procedural rule that may satisfy due process in one context may not necessarily satisfy procedural due process in every case." *Burson, 402 U.S. at 540.* The procedural safeguards sufficient to protect one's interest in welfare benefits, for example, may not suffice when one faces a felony charge. *Compare Goldberg v. Kelly*, 397 U.S. 254, 25 L. Ed. 2d 287, 90 S. Ct. 1011 (1970), with *Gideon v. Wainwright*, 372 U.S. 335, 9 L. Ed. 2d 799, 83 S. Ct. 792 (1963). There are, however, certain longstanding bare minimum components to the right to procedural due process.

The opportunity to be heard "at a meaningful time and in a meaningful manner" is the fundamental requirement of procedural due process. *Mathews v. Eldridge*, 424 U.S. 319, 332, 47 L. Ed. 2d 18, 96 S. Ct. 893 (1976) (citing *Armstrong v. Manzo*, 380 U.S. 545, 552, 14 L. Ed. 2d 62, 85 S. Ct. 1187 (1965)). For over one hundred years, our courts have held that due process of law requires "specific charges, due notice of such charges, an opportunity to make specific answers to them, an opportunity to cross-examine the witnesses in support of them, an opportunity to adduce testimony in contradiction of them, and an opportunity for argument upon the testimony and

upon the law and facts." *United States ex rel. Wedderburn v. Bliss*, 12 App. D.C. 485, 493 (1898). Thus, in order to satisfy due process' "meaningful hearing" requirement, the inquiry that is made must involve at least some assessment of fault or liability. *See Burson*, 402 U.S. at 539.

On its face, HVIRA makes no provision for any hearing whatsoever. Defendant argues that the statute's facial lack of a hearing provision does not render it unconstitutional because the right to a hearing must be "implied into" the statute itself in the absence of language to the contrary. *See Fascination Inc. v. Hoover*, 39 Cal. 2d 260, 246 P.2d 656 (1952).[6] The hearing that will be provided under HVIRA, to the extent that HVIRA contemplates a hearing at all, however, is not a meaningful hearing for the purposes of surviving a due process challenge. Defendant's position, supported by the plain language of the statute, is that an insurer's failure to produce documents, for any reason other than the fact that no documents exist, will trigger an immediate license suspension action. According to defendant, that action will take the form of a hearing before an administrative law judge. Leslie Tick's testimony and the statute itself make it clear that the administrative law judge is not permitted to exercise any discretion as to whether non-compliance might be excused or justified, or mitigated in any way that could affect the outcome of the hearing.

Thus, as both this court and the defendant interpret the statute, the same sole fact that triggers the suspension hearing

---

[6] Defendant, having thus apparently conceded that plaintiffs would be entitled to a hearing, (indeed, having argued that a hearing is so obviously necessary as to be implied), later cites *Codd v. Velger*, 429 U.S. 624, 628, 51 L. Ed. 2d 92, 97 S. Ct. 882 (1977), for the proposition that "a hearing need not be provided when there are no factual issues in dispute." In other words, a hearing would be required in theory, but would not be required in application, because, here, there would be no facts to resolve. A statute that sustains such contrary reasoning in its defense, because it facially obviates any practical need for the impliedly-necessary and constitutionally-required hearing, must be a violation of due process.

will dictate its outcome. That cannot possibly amount to a meaningful hearing. Such a "hearing" is particularly meaningless where, as here, the same individual who decides to trigger the hearing makes the final determination of whether to suspend the license.[7] Under HVIRA, failure to produce the demanded records for any reason at all, even impossibility, effectively results in automatic license suspension. This is the deprivation of a protected property interest without due process of law.

Defendant contends that there are disputed issues as to whether plaintiffs, as they have asserted, actually lack the corporate authority to compel production of the demanded documents from their affiliates. Other than raising evidentiary objections to plaintiffs' declarations and making legal arguments about the meaning of the word "control," defendant has not presented any substantial evidence to create a triable issue of fact on the question of corporate control. Defendant also disputes, and asks this court to determine as a matter of law, whether foreign criminal and civil laws prohibit production of the information required by HVIRA.[8] On a procedural due process analysis, however, the question of whether plaintiffs could ultimately prove that it is impossible

---

[7] Section 790.15 specifies that an action to suspend a certificate of authority under this section shall be conducted in accordance with the Administrative Procedure Act. That Act directs that the "agency" itself, in this case, the Commissioner, render the final decision. Cal. Govt. Code § 11517.

[8] Though the court declines to reach a conclusion of law as to whether German and/or Swiss laws prohibit plaintiffs' European affiliates from complying with HVIRA, the court notes that, other than making evidentiary objections, defendant has not presented evidence to refute the submitted position of the Swiss government as to the impact of Article 273 of the Swiss Penal Code. Moreover, if it were to reach the issue, this court would owe "substantial deference" to a foreign nation's interpretation of its own laws. *See In Re Oil Spill by the Amoco Cadiz*, 954 F.2d 1279, 1312 (7th Cir. 1992).

for them to comply with HVIRA does not control.[9] The fact that the statute *denies them the opportunity to be heard on that point*, or, for that matter, on any point, is what controls.

d. Whether the state's "licensure power" somehow obviates plaintiffs' entitlement to a meaningful hearing under procedural due process

Defendant argues that "California can rationally condition the privilege of doing business in the State" on strict compliance with HVIRA's disclosure requirements. Defendant persists in the position that the first, last, and only constitutional question in this case is the rational basis test. There are, however, other limitations on a state's power. The state cannot, for example, impose conditions on doing business in California which require relinquishment of constitutional rights. *See* generally Laurence H. Tribe, American Constitutional Law § 11.5 at 781 (2d ed. 1988) ("Independently unconstitutional conditions — those that make enjoyment of a benefit contingent on sacrifice of an independent constitutional right — are invalid."). *See also Barron v. Burnside*, 121 U.S. 186, 200, 30 L. Ed. 915, 7 S. Ct. 931 (1887) ("In all the cases in which this court has considered the subject of the granting by a state to a foreign corporation of its consent to do business in the state, it has uniformly asserted that no conditions can be imposed by the state which are repugnant to the Constitution."); *Terral* v. *Burke Constr. Co.*, 257 U.S. 529, 532-533, 66 L. Ed.

---

[9] Plaintiff has submitted evidence which tends to show, at the least, that their affiliates believe compliance is unlawful and are refusing to provide the demanded documents. Recognition of impossibility as an excuse for non-performance is a long-standing tenet of our justice system. There are numerous cases which stand for the proposition that a sanction imposed for failing to produce information due to inability violates our notions of fundamental fairness and due process. *See e.g., Societe Internationale Pour Participations Indistrielles et Commerciales v. Rogers*, 357 U.S. 197, 212, 2 L. Ed. 2d 1255, 78 S. Ct. 1087 (1958); and *In re United States v. Sumitomo Marine & Fire Ins. Co.*, 617 F.2d 1365, 1369 (9th Cir. 1980).

352, 42 S. Ct. 188 (1922) ("The sovereign power of a State in excluding foreign corporations, as in the exercise of all others of its sovereign powers, is subject to the limitations of the supreme fundamental law."); and *Dolan v. City of Tigard*, 512 U.S. 374, 385, 129 L. Ed. 2d 304, 114 S. Ct. 2309 (1994) (simply denominating governmental interest as "business regulation" does not immunize it from constitutional challenge).

At oral argument and in its papers, defendant specifically referred to California's Insurance Holding Company System Regulatory Act, ("IHCSRA"), arguing that it establishes that California has an existing, presumably constitutionally permissible, public policy of requiring insurance companies to report information pertaining to their foreign affiliates. Several ways in which this regulatory statute is distinguishable from HVIRA bear mention. First, it seeks significantly narrower information, related only to the affiliates' financial viability. Second, it specifically provides that the disclosed information shall be treated as confidential and shall not be made public by the Commissioner. Third, and most notably, it provides a forum within which insurers can present factual defenses to a failure to disclose "allegation" against them, and specifically dictates that an insurer will be given "notice and an opportunity to be heard" before the Commissioner acts to suspend, revoke, or refuse to renew a license for non-compliance with the disclosure requirements. *See* California Insurance Code § 1215 *et seq.* In short, IHCSRA is in many ways exactly what HVIRA is not. Its existence in no way establishes that HVIRA is constitutional, and it certainly does not support defendant's implied argument that the state's "licensure" power somehow trumps the requirements of procedural due process.

e. Conclusion

By providing that no state shall "deprive any person of life, liberty, or property without due process of law," the Fourteenth Amendment of our Constitution binds the fundamental

protections of life, liberty, and property together into one concept. We need look no further than the factual background of this case to understand why these three protections are so joined.

Ever since the Fourteenth Amendment was enacted in 1866, courts have struggled to define precisely what it means to protect our property interests with "due process." One tenet of this area of jurisprudence is clear, however: a state may not "make any thing due process of law" by merely declaring it to be so. *Davidson v. New Orleans*, 96 U.S. 97, 102, 24 L. Ed. 616 (1877). The power of a state is not unchecked, and it is not absolute. Neither does it become so, as the Commissioner has argued here, under the cloak of some "licensure" power. It does not even become so if the power is wielded out of the purest intention to somehow right one of humanity's wrongs, or to facilitate some amount of redress for the victimized.

By mandating license suspension for non-performance of what may be impossible tasks without allowing for a meaningful hearing, HVIRA deprives plaintiffs of a protected property interest without affording them due process of law. Plaintiffs' joint motion for summary judgment that the HVIRA is unconstitutional under the Due Process Clause must therefore be granted.

IV. *Other Grounds for Summary Judgment*

Plaintiffs have also argued that the statute is unconstitutional for various other reasons, including that it is unconstitutionally vague. Because the court finds that the statute violates the Due Process Clause, and because, following the guidance of the Ninth Circuit's remand, the parties have focused their development of the factual record on due process issues, the court does not reach the other constitutional challenges raised by plaintiffs.

Also, defendant moves for summary judgment on the ground that HVIRA is not constitutional [sic] for any other

reason raised in any plaintiffs' complaint.[10] Because the court finds that the statute is unconstitutional on due process grounds, the court need not render advisory opinions on defendant's arguments that the statute passes other constitutional tests. Defendant's motion for summary judgment will therefore be denied on the ground that the statute violates due process.

IT IS THEREFORE ORDERED that plaintiffs' motions for summary judgment upon the ground that HVIRA violates due process be, and the same hereby are, GRANTED. Defendant is hereby permanently enjoined from suspending the licenses of the plaintiffs to do business in California based on their failure to comply with the Holocaust Victim Insurance Relief Act and its accompanying regulations.

IT IS FURTHER ORDERED that defendant's motion for summary judgment upon the ground that HVIRA is not unconstitutional be, and the same hereby is, DENIED.

DATED: October 1, 2001

/s/ William B. Shubb

UNITED STATES DISTRICT JUDGE

---

[10] Defendant's original moving papers addressed all of plaintiffs' constitutional challenges except the due process argument raised by the Generali plaintiffs concerning the Commissioner's allegedly unconstitutional "campaign" against Generali.

APPENDIX D

UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF CALIFORNIA

No. Civ. S-00-0506 WBS JFM

GERLING GLOBAL REINSURANCE CORP. OF AMERICA, *et al.*, *Plaintiffs*,

v.

CHUCK QUACKENBUSH in his capacity as COMMISSIONER OF INSURANCE OF THE STATE OF CALIFORNIA, *Defendant*.

No. Civ. S-00-0613 WBS JFM

AMERICAN INSURANCE ASSOCIATION and AMERICAN RE-INSURANCE CO., *Plaintiffs*,

v.

CHUCK QUACKENBUSH in his capacity as COMMISSIONER OF INSURANCE OF THE STATE OF CALIFORNIA, *Defendant*.

No. Civ. S-00-0779 WBS JFM

WINTERTHUR INTERNATIONAL AMERICA INSURANCE CO., *et al.*, *Plaintiffs*,

v.

CHUCK QUACKENBUSH in his capacity as COMMISSIONER OF INSURANCE OF THE STATE OF CALIFORNIA, *Defendant*.

No. Civ. S-00-0875 WBS JFM

ASSICURAZIONI GENERALI S.p.A., *Plaintiff,*

v.

CHUCK QUACKENBUSH in his capacity as COMMISSIONER OF INSURANCE OF THE STATE OF CALIFORNIA, *Defendant.*

Filed: June 9, 2000

MEMORANDUM AND ORDER; PRELIMINARY INJUNCTION

In October 1999, California enacted the Holocaust Victim Insurance Relief Act ("HVIRA"). *See* Cal. Ins. Code §§ 13800-13807 and accompanying regulations, Cal. Code Regs. Tit. 10 §§ 2278-2278.5.[1] The stated purpose of the HVIRA is for insurance companies doing business in the State of California to ensure that "any involvement they or their related companies may have had with insurance policies of Holocaust victims are disclosed to the state and to ensure the rapid resolution of these questions, eliminating further victimization of these policyholders and their families." Cal. Ins. Code § 13801(e). Each set of plaintiffs has moved against defendant Chuck Quackenbush, the California Commissioner of Insurance, for a preliminary injunction against enforcement of the HVIRA and accompanying regulations on the grounds that they are unconstitutional and that such enforcement will cause plaintiffs

[1] Some of the plaintiffs use the term "HVIRA" to refer to all statutes related to California Insurance Code sections 13800-13807, including California Insurance Code section 790.15 and California Code of Civil Procedure section 354.5. In fact, the latter two sections were enacted before Insurance Code sections 13800-13807 and are not part of the HVIRA. When the court uses the term "HVIRA," it refers only to California Insurance Code sections 13800-13807 and the accompanying regulations.

irreparable harm. *See* Fed. R. Civ. P. 65.[2]

I. *Facts*

A. *The Statutes*

The disputed statutes and regulations relate to claims asserted by Holocaust victims or their heirs or beneficiaries for coverage under insurance policies issued in Europe between 1920-1945. After the National Socialist (NAZI) party came to power, it enacted a series of statutes authorizing governmental confiscation of Jewish property and other assets, including insurance proceeds. Under these NAZI statutes, German insurers were required to pay the proceeds of insurance policies of Jewish residents to "blocked accounts" controlled by the NAZI government. A 1943 statute ordered confiscation of the estates of deceased Jews. Further, although many Holocaust victims had insurance policies, many lost the papers during their imprisonment. In many cases, the persons most knowledgeable about the policy were killed, leaving heirs without a paper trail. As a result, many Holocaust victims and their descendants and heirs have never collected on insurance policies.

The HVIRA requires insurance companies doing business in California to file reports disclosing policies issued in Europe during the period 1920-1945. *See* Cal. Ins. Code §§ 13800-13807. Other statutes extend the statute of limitations for filing

[2] Gerling additionally moves for a preliminary injunction against enforcement of California Civil Procedure Code section 354.5 and California Insurance Code section 790.15. The court dismisses Gerling's motion as to these two claims. (*See* Order re: Motion to Dismiss, filed concurrently.) Hence, the court only considers the parties' motions for preliminary injunction against enforcement of the HVIRA.

Gerling also moves for summary judgment on the same claims discussed in its motion for preliminary injunction. Because discovery is incomplete, and defendant has not responded to that motion, the court does not consider it at this time. See Fed. R. Civ. P. 56(f).

such claims (Cal. Civ. Proc. Code § 354.5), and suspend the license of insurance companies who have not paid valid claims (Cal. Ins. Code § 790.15).

1. *California Insurance Code §§ 13800-13807 ("HVIRA")*

The HVIRA obligates insurers doing business in California to file reports identifying insurance policies (life, property, liability, health, annuities, dowry, educational, or casualty) sold to persons in Europe between 1920 and 1945 directly or through a "related company." Cal. Ins. Code § 13804(a). A "related company" is "any parent, subsidiary, reinsurer, successor in interest, managing general agent, or affiliate company of the insurer." Cal. Ins. Code § 13802(b). Specifically, the statute requires the insurer or related company to file with the registry: (1) the number of those insurance policies; (2) the holder, beneficiary, and current status of those policies; and (3) the city of origin, domicile, or address for each policy holder. *See* Cal. Ins. Code § 13804(a). Further, with regard to each policy, the insurer must certify one of the following: (1) that the proceeds of the policies have been paid to the designated beneficiaries or their heirs where that person or persons, after diligent search, could be located and identified; (2) that the proceeds where the beneficiaries or heirs could not, after diligent search, be located or identified, have been distributed to Holocaust survivors or to qualified charitable nonprofit organizations for the purpose of assisting Holocaust survivors; (3) that a court of law has certified in a legal proceeding resolving the rights of unpaid policyholders, their heirs, and beneficiaries, a plan for the distribution of the proceeds; or (4) that the proceeds have not been distributed and the amount of those proceeds. *See* Cal. Ins. Code § 13804(b).

Under the regulations, these reports were to be filed on or before April 7, 2000. *See* Cal. Code Regs. § 2278.4. Under the statute, if the reports were not filed by the 210th day after the HVIRA became effective (May 7, 2000), the Commissioner

"shall suspend the certificate of authority to conduct insurance business in the state . . . ." Cal. Ins. Code § 13806.[3]

2. *California Civil Procedure Code § 354.5*

Under this statute, any Holocaust victim or heir or beneficiary who resides in the state may bring a legal action to recover on any claim arising out of an insurance policy or policies purchased or in effect in Europe before 1945 from an insurer (defined term), "notwithstanding any other provision of law." Cal. Civ. Proc. Code § 354.5(b). Further, it forbids dismissal of any claim whether brought by a resident or nonresident on statute of limitations grounds as long as the action is commenced on or before December 31, 2010. *See* Cal. Civ. Proc. Code § 354.5(c)

3. *California Insurance Code § 790.15*

This statute modifies the Insurance Code to empower the Insurance Department of the State of California to suspend the license of an insurer admitted to do business in California if the Department concludes that an "affiliate" of the insurer has failed to pay any valid claim from Holocaust survivors.

B. *International Negotiations*

The federal government, along with foreign governments and insurance companies, is also grappling with the same goal of giving Holocaust victims some compensation for lost monies from insurance policies.

The United States and German governments have recently negotiated the formation of the Foundation for Remembrance, Responsibility, and the Future ("Foundation") funded by the German government and German corporations to resolve the claims of Holocaust victims. The Foundation is capitalized with

---

[3] Defendant has represented that he will not attempt to enforce the statute against plaintiffs until 20 days after the motions for preliminary injunction have been heard.

approximately $5 billion dollars toward payments of victims of slave and forced labor, as well as payments on asserted claims related to insurance, banking, taking of property, and medical experiments. In a December 13, 1999 letter to Chancellor Schroeder, President Clinton stated that the executive agreement between the two countries shall state that the "Foundation should be regarded as the exclusive remedy for all claims against German companies arising out of the Nazi era." (American: Sullivan Decl. Ex. 6, 12/13/99 Clinton letter to Schroeder)[4] Deputy Secretary of the Treasury Stuart Eizenstat is the principal representative of the United States on these issues.

A second organization, the International Commission on Holocaust Era Insurance Claims ("ICHEIC"), chaired by former Secretary of State Lawrence Eagleburger, was established as a voluntary organization between European regulators, major European insurance companies, representatives of Jewish and Holocaust survivor organizations, Israel, and the National Association of Insurance Commissioners in the United States. Generali and the Winterthur plaintiffs are members.

The framework for the ICHEIC is set out in a Memorandum of Understanding ("MOU"). Among other things, the MOU provides that the ICHEIC shall conduct an investigatory process to determine the current status of insurance policies issued to Holocaust victims for which claims are filed with the ICHEIC and shall establish a claims process to settle and pay individual claims. (American: Sullivan Decl. Ex. 13, MOU). Eizenstat told the House Banking Committee that "[t]he U.S. Government has supported the International Commission on Holocaust Era Insurance Claims since it began, and we believe it should be considered the exclusive remedy for

[4] Many of the exhibits appear in some or all of the various plaintiffs' papers. The court will only cite to one location of each exhibit.

resolving insurance claims from the World War II era." (Winterthur: Grimm Decl. Ex. I, Eizenstat 2/9/00 at House Banking Committee hearing).[5] It is expected that the German Foundation will recognize the ICHEIC as the exclusive mechanism for resolving insurance claims. (Winterthur: Grimm Decl. Ex. I, Eizenstat 2/9/00 at House Banking Committee hearing).[6]

C. *The Parties*

Plaintiffs in all four cases are insurance companies licensed to do business in California. Each set of plaintiffs alleges that the statutes are unconstitutional. In all four cases, defendant is Chuck Quackenbush in his capacity as the Commissioner of Insurance of the State of California.

[5] Defendant objects that Eizenstat's statement lacks foundation and is inadmissible hearsay. At the preliminary injunction stage, however, the court may consider hearsay. "The urgency of obtaining a preliminary injunction necessitates a prompt determination and makes it difficult to obtain affidavits from persons who would be competent to testify at trial. The trial court may give even inadmissible evidence some weight, when to do so serves the purpose of preventing irreparable harm before trial." *Flynt Distrib. Co., Inc.* v. *Harvey*, 734 F.2d 1389, 1394 (9th Cir. 1984). Consequently, the court does not discuss each of defendant's evidentiary objections.

[6] The plaintiffs also discuss a 1995 agreement between the United States and Germany to "settle compensation claims by certain United States nationals who suffered loss of liberty or damage to body or health as a result of National Socialist measures of persecution directly against them." This agreement provided for two separate payments by Germany in settlement of the claims. In return for the payments by the German government, the United States "declare[d] all compensation claims against the Federal Republic of Germany by United States nationals for damage within the meaning of [the Agreement] to be finally settled." This Agreement, although related in topic, is not directly applicable because it deals with claims against Germany, not against insurance companies, and does not appear to involve insurance claims.

1. *Gerling Global Reinsurance Corporation of America ("Gerling")*

Plaintiffs are five insurance companies licensed to do business in California. They are "related to" or "affiliated" with two German companies (Gerling-Konzern Allgemenine Versicherungs-AG ("GKA") and Gerling-Konzern Lebensversicherungs-AG ("GKL") that issued policies in Europe during the proscribed time period. Hence, they have to file reports. Gerling alleges that the HVIRA is unconstitutional under: (1) the constitutional grant of authority to the federal government over foreign affairs; (2) the Commerce Clause; (3) the Due Process Clause; (4) Bill of Attainder; (5) the Fourth Amendment; and (6) the Contracts Clause.

2. *American Insurance Association and American Re-Insurance Co. (together, "American")*

Plaintiffs are American Insurance Association ("AIA") and American Reinsurance Company ("AmRe"). AIA principally represents American insurance companies that did not issue insurance policies in Europe during the relevant period and do not own or control any companies that did.[7] Five members of AIA are related to European companies that issued the applicable policies. AmRe is a large insurance company licensed to do business in California. AmRe claims that neither it, nor any subsidiary or affiliate over which it has control, issued insurance policies that were in effect in Europe during 1920-1945.

American claims that the statutes are unconstitutional for three reasons: (1) the HVIRA treads on the federal government's exclusive power to conduct foreign relations; (2) the HVIRA violates the Foreign Commerce Clause; and (3) the HVIRA violates the Due Process clause.

---

[7] Assicurazioni Generali, a European Company, is also represented by American Insurance, but files its own motion for preliminary injunction.

3. *Winterthur International American Insurance Co., et al. (together, "Winterthur")*

Plaintiffs are nine insurance companies licensed to do business in California. None of the companies ever issued insurance policies in Europe during the applicable time period, though each is "related" to such a company. Each plaintiff claims, however, that it is not in possession, custody, or control of any records pertaining to insurance companies sold by "related companies."

Winterthur argues that the HVIRA is unconstitutional because: (1) it is an unconstitutional invasion of the federal government's foreign affairs power; (2) it violates the Dormant Commerce Clause; (3) it violates the Due Process Clause; (4) it deprives plaintiffs of rights secured by the Equal Protection Clause; (5) it is an unconstitutional bill of attainder; and (6) implementation constitutes an unreasonable search and seizure.

4. *Assicurazioni Generali, S.p.A ("Generali")*

Generali is an Italian insurance company that issued insurance policies in Europe during the applicable time period. Generali is represented by the AIA, but has filed separately because it claims that the Insurance Commissioner has singled it out for attack, even though it has been paying insurance claims from Holocaust victims for the last several years.

Generali claims the HVIRA unconstitutionally violates the Due Process and Commerce Clauses and invades the foreign affairs power of the federal government.

D. *Threatened Enforcement*

The Commissioner has actively threatened enforcement against all plaintiffs. He subpoenaed many insurance companies, including plaintiffs and those represented by plaintiffs, to appear at a hearing on December 1, 1999. At the hearing, Quackenbush informed the insurance companies, "[t]his issue will be resolved in California. I promised that for

the last two years. And on April 6th, you're going to see just how serious California is if you have not complied with this law." (Generali: Tiberini Decl., Ex. 10, Transcript of 12/1/99 Investigatory Hearing, 14:16-20). He told Generali specifically, "I want you to take back to your officers in Italy and everywhere else, that you might want to consider seriously leaving the State, because it's obvious to me right now that you have no intention of complying with the law." (Generali: Tiberini Decl., Ex. 10, Transcript of 12/1/99 Investigatory Hearing, 49:12-16). At the end of questioning Generali, Quackenbush stated generally, "it is your choice now whether you're going to work with this Department of Insurance to bring your company in full compliance, whether you're going to leave the state voluntarily, or whether I'm going to kick you out. That's your three choices." (Generali: Tiberini Decl., Ex. 10, Transcript of 12/1/99 Investigatory Hearing, 51:19-23).

II. *Standard*

"To obtain a preliminary injunction, a party must establish either: (1) probable success on the merits and irreparable injury, or (2) sufficiently serious questions going to the merits to make the case a fair ground for litigation with the balance of hardships tipping decidedly in the movant's favor." *See Baby Tam & Co.* v. *City of Las Vegas*, 154 F.3d 1097, 1100 (9th Cir. 1998). These two formulations represent two points on a sliding scale in which the required degree of irreparable harm increases as the probability of success decreases. *See id.* The movant has the burden of proving each element of either test. *See Prescott* v. *County of El Dorado*, 915 F. Supp. 1080, 1084 (E.D. Cal. 1996).

Under the doctrine of *Ex Parte Young*, 209 U.S. 123, 52 L. Ed. 714, 28 S. Ct. 441 (1908), it is appropriate for a party to move for a preliminary injunction in federal court against state officers "who threaten and are about to commence proceedings, either of a civil or criminal nature, to enforce against parties affected an unconstitutional act, violating the Federal

Constitution . . . ." *Id.* at 156. A preliminary injunction is particularly appropriate when the moving party is faced with a "Hobson's choice" of continuing to violate the law, thus exposing itself to huge liability, or to "violate the law once as a test case and suffer the injury of obeying the law during the pendency of the proceedings and any further review." *Morales* v. *Trans World Airlines, Inc.*, 504 U.S. 374, 381, 119 L. Ed. 2d 157, 112 S. Ct. 2031 (1992).

III. *Probability of Success on the Merits*

Among them, the various plaintiffs make seven claims regarding the constitutionality of the statutes. They claim that the statutes violate: (1) the constitutional grant of authority to the federal government over foreign affairs (all parties); (2) Commerce Clause (all parties); (3) the Due Process Clause (all parties); (4) Bill of Attainder (Gerling and Winterthur); (5) the Fourth Amendment (Gerling and Winterthur); (6) the Contracts Clause (Gerling); and (7) Equal Protection (Winterthur). The court finds that plaintiffs have established a probability of success under the foreign affairs doctrine and the Commerce Clause. Accordingly, the court limits its analysis to these claims, and it is unnecessary to address the other claims.

A. *Foreign Affairs*

The framers of the Constitution made clear that the federal government was to have supreme power in the general field of foreign affairs. *See Hines* v. *Davidowitz*, 312 U.S. 52, 62, 85 L. Ed. 581, 61 S. Ct. 399 (1941). James Madison, in addressing the people of the State of New York, explained that the proposed Constitution contained a "class of powers, lodged in the general government, consist[ing] of those which regulate the intercourse with foreign nations . . . . This class of powers forms an obvious and essential branch of the federal administration. If we are to be one nation in any respect, it clearly ought to be in respect to other nations." Madison, *The Federalist Papers*, No. 42. Alexander Hamilton wrote, regarding the power of the federal judiciary over laws which

involve the peace of the confederacy: "the peace of the WHOLE ought not be left at the disposal of a PART. The Union will undoubtably be answerable to foreign powers for the conduct of its members. And the responsibility for an injury ought ever be accompanied with the faculty of preventing it." Hamilton, *The Federalist Papers*, No. 80.[8]

The Supreme Court has clarified the federal government's control over foreign affairs. "The Constitution entrusts [the nation's foreign affairs and international relations] solely to the Federal Government." *Zschernig* v. *Miller*, 389 U.S. 429, 436, 19 L. Ed. 2d 683, 88 S. Ct. 664 (1968). "Power over external affairs is not shared by the States; it is vested in the national government exclusively." *United States* v. *Pink*, 315 U.S. 203, 233, 86 L. Ed. 796, 62 S. Ct. 552 (1942). "Our system of government is such that the interest of the cities, counties and states, no less than the interest of the people of the whole nation, imperatively requires that federal power in the field affecting foreign relations be left entirely free from local interference." *Hines*, 312 U.S. at 63.

Zschernig is the most recent case addressing the issue of foreign affairs. This case involved an Oregon probate law that conditioned inheritance rights of a nonresident alien upon the alien's ability to demonstrate that his country of origin would grant reciprocal rights to a U.S. citizen and would not confiscate any of the inherited property. *See Zschernig*, 389 U.S. at 430-431. The Court held that the statute "affect[ed] international relations in a persistent and subtle way," *id.* at 440, had "great potential for disruption or embarrassment," *id.* at 435, and had "more than some incidental or indirect effect in foreign countries," *id.* at 434. Thus, the statute intruded into "matters which the Constitution entrusts solely to the Federal

[8] *See also The Federalist Papers* Nos. 3, 4. Here, John Jay discusses the importance of the national government in relation to keeping the peace with foreign powers.

Government." *Id.* at 436.[9]

1. *The HVIRA's Goal is International in Nature*

The stated goal of the HVIRA is to exercise a power exclusively entrusted to the national government. The statute states that "this chapter is necessary to . . . encourage the development of a resolution to these [insurance claim] issues through the international process or through direct action by the State of California, as necessary." Cal. Ins. Code § 13801(f). Encouraging resolution through an international process clearly implicates matters of foreign affairs, and, as such, is a function vested in the national government.

2. *Effects on International Relations and Potential for Disruption and Embarrassment*

Plaintiffs have demonstrated a probability that the HVIRA affects international relations. The United States federal government has been actively involved in compensating Holocaust victims since the end of World War II. In 1952, the United States was a party to a treaty among France, England, the United States, and Germany transferring to the Federal Republic of Germany the responsibility for implementing reparations. "The Federal Republic [of Germany] acknowledges the obligation to assure . . . adequate compensation to persons persecuted for their political convictions, race, faith or ideology, who thereby have suffered damage to life, limb, health, liberty, property, their possessions

[9] The First Circuit applied and interpreted *Zschernig* in *National Foreign Trade Council v. Natsios*, 181 F.3d 38 (1st Cir. 1999), cert. granted, 120 S. Ct. 525 (1999). There, the First Circuit declared unconstitutional a Massachusetts law which restricted the ability of Massachusetts and its agencies to purchase goods or services from companies that do business with Burma. *See id.* The First Circuit held that the law had "more than an incidental or indirect effect in foreign countries," *Natsios*, 181 F.3d at 52 (quoting *Zschernig*, 389 U.S. at 434), and a "great potential for disruption or embarrassment" as evidenced by the protests of America's trading partners, 181 F.3d at 54 (quoting *Zschernig*, 389 U.S. at 435).

or economic prospects (excluding identifiable property subject to restitution)." (Gerling: Appendix of Authorities, Ex. A, Transition Agreement, Ch. 4 ¶ 1). Since that treaty, the United States has been actively involved in Holocaust victims compensation efforts. The HVIRA has a strong potential of interfering with these efforts.

First, the HVIRA has the real potential of frustrating the United States' efforts in negotiating the German Foundation. This Foundation, capitalized at close to $5 billion, will provide payments to victims of slave and forced labor as payments on asserted claims related to insurance, banking, taking of property, and medical experiments. On December 17, 1999, Secretary of the Treasury Stuart Eizenstat, the Special Representative of the Secretary of State and the President on Holocaust-Related Issues Senate Foreign Relations Committee, stated that "in the context of a comprehensive German Foundation, in all cases, consensual and non consensual, brought against German companies for claims arising out of the Nazi-era, we are prepared to say that the German Foundation should be regarded as the exclusive remedy and that dismissal of such cases would be in our foreign policy interests." (American: Sullivan Decl. Ex. 11, 12/17/99 Press Release).[10] The German Foundation cannot be the exclusive remedy if California's HVIRA is also applicable.

Second, the HVIRA has a potentially negative effect on the ICHEIC, which is a voluntary organization of European regulators, major European insurance companies, representatives of Jewish and Holocaust survivor organizations, Israel, and the National Association of Insurance Commissioners in the United States insurance companies. The ICHEIC investigates Holocaust era insurance policies and helps settle claims. Eizenstat wrote Quackenbush in November 1999

---

[10] Defendant argues that the German Foundation is not in place, and thus is not a federal policy. However, the very negotiation for a German Foundation dedicated toward compensation implicates foreign policy.

that the HVIRA "has the unfortunate effect of damaging the one effective means now at hand to process quickly and completely unpaid insurance claims from the Holocaust period, the International Commission on Holocaust Era Insurance Claims . . . ." (American: Sullivan Decl. Ex. 24, 11/30/99 Eizenstat letter to Quackenbush). Further, Eizenstat informed Quackenbush, "you should know that actions by California, pursuant to this law, have already threatened to damage the cooperative spirit which the International Commission requires to resolve the important issue for Holocaust survivors." (American: Sullivan Decl. Ex. 24, 11/30/99 Eizenstat letter to Quackenbush). Eizenstat wrote Governor Davis on the same day, stating, "actions by California, pursuant to this law, have already potentially damaged and could derail both a settlement of forced and slave labor negotiations and the progress already achieved by the International Commission on Holocaust Era Insurance Claims . . . ." (American: Sullivan Decl. Ex. 23, 11/30/99 Eizenstat letter to Governor Davis).

Former Secretary of State Lawrence Eagleburger, the chair of the ICHEIC, testified that he believes that under the terms of the MOU under which the ICHEIC was organized, each insurance company that signed the MOU and is fully cooperating in the ICHEIC process "is entitled to receive, and should receive," an exemption from the enforcement of legislation such as the HVIRA. (Winterthur: Eagleburger Decl. ¶ 12). Section 10 of the MOU requires signatories to "work to achieve exemptions from related pending and future legislation . . . for those insurers that become signatories to this MOU and which fully cooperate with the processes and funding of the IC." (Winterthur: Eagleburger Decl. Ex. A.). ICHEIC members include plaintiffs Winterthur and Generali.

Third, the HVIRA potentially conflicts with the January 29, 2000 Joint Statement issued by the United States and Swiss governments at the inaugural meeting establishing the Swiss-US Joint Economic Commission ("Joint Statement"). Specifically, in the Action Plan attached to the Joint Statement,

the United States government promised to "call on the U.S. State insurance Commissioners and State legislative bodies to refrain from taking unwarranted investigative initiatives or from threatening or actually using sanctions against Swiss insurers." (Winterthur: Thalmann Supp. Decl. Ex. A, Joint Statement Action Plan at 3).

Finally, the HVIRA potentially conflicts with the national goal of creating "enduring legal peace." Eizenstat referred to this goal in his November 30, 1999 letter to Governor Davis. With regard to the German Foundation, Eizenstat stated, "clearly, for this deal to work . . . German industry and German government need to be assured that they will get 'legal peace', not just from class-action lawsuits, but from the kind of legislation represented by the California Victim Insurance Relief Act." (American: Sullivan Decl. Ex. 23, 11/30/99 Eizenstat letter to Governor Davis). President Clinton and Secretary of State Madeline Albright each echoed this sentiment several weeks later as the negotiations for the German Foundation began to close. President Clinton, in a December 13, 1999 letter to Chancellor Schroeder, wrote that "the Foundation should be regarded as the exclusive remedy for all claims against German companies arising out of the Nazi era. [The executive agreement] will state further that both our countries desire all embracing and enduring legal peace to advance our foreign policy interests." (American: Sullivan Decl. Ex. 6, 12/13/99 Clinton letter to Schroeder). Albright, when addressing the Slave Labor Meeting in Berlin on December 17, 1999 stated in relation to the German Foundation that "[t]he United States is agreeing to assist in providing legal peace to German companies, both in our courts and from state and local action. To succeed in achieving legal peace, it is essential that the Foundation be comprehensive." (American: Sullivan Decl. Ex. 9, 12/17/99 Albright remarks).

By conflicting so directly with the national government's policies and promises, the HVIRA not only affects international relations, but also has "great potential for disruption or

embarrassment." *See* Zschernig, 389 U.S. at 435. The HVIRA is inconsistent with Eizenstat's statements regarding the German Foundation as the exclusive remedy for claims from the Nazi era. It conflicts with the cooperative spirit of the ICHEIC, which the United States supports. The HVIRA makes the United States' promises in the U.S.-Swiss Joint Economic Statement appear to be unfulfilled. Finally, "legal peace" cannot be achieved if California and each of the other states are free to enact their own legislation forcing companies to report insurance policies or lose their license. *See* Cal. Code Ins. §§ 13800-13807.

Defendant argues that plaintiffs "have not demonstrated that the Holocaust Statutes have an actual direct impact on foreign relations. Indeed, plaintiffs cannot point to any federal policy enactments that the Holocaust Statutes must give way to." (Opp'n. at 84). Defendant then cites to the declarations of Robert Brown, the representative of the Minister of Israeli Society in the World Jewish Community, Linda Gerstel, a shareholder in a law firm representing Holocaust victims in class action insurance cases, and Leslie Tick, staff counsel to the Department of Insurance, and an attorney for defendant.[11] Brown states that he took part in the negotiations of the German Foundation settlement and claims that he does "not believe that the [HVIRA] interfered with the negotiations of the Germany Foundation settlement." (Opp'n.: Brown Decl. ¶ 6). Gerstel testified that she participated in the German Foundation negotiations and states that "nothing in the negotiations . . . was intended to effect or nullify the powers of the State Insurance Commissioners or any related regulatory scheme including, but not limited to, legislation enacted in California." (Opp'n.: Gerstel Decl. ¶ 7). Tick described the formation of the ICHEIC and its work. Defendant has not made clear which portion of

[11] Plaintiffs object on numerous grounds to parts of all three declarations. Because the court does not rely on the declarations, the court does not address the objections.

her lengthy declaration and exhibit supports defendant's claim.

Defendant's argument is wholly unpersuasive. First of all, as discussed above, several policy makers in the Executive Branch have clearly stated the United States' position with regard to the compensation of Holocaust victims. The fact that several participants in the German Foundation negotiations stated that they do not think that negotiations were compromised by the California statutes is irrelevant. The German Foundation negotiations are simply an illustration of potential foreign affairs that could be affected by the HVIRA. In any case, even if the HVIRA did not actually affect the negotiations, it certainly has the potential to affect foreign affairs *and* it is embarrassing to the United States to have individual states enacting legislation inconsistent with Executive promises and negotiations. *See Zschernig*, 389 U.S. at 435. Thus, the HVIRA interferes with the national government's exclusive power over external affairs. *See Pink*, 315 U.S. at 233.

Second, there does not have to be a formally stated national policy in order for a state to impermissibly interfere with foreign affairs. Under *Zschernig*, a state statute that affected international relations in "a persistent and subtle way" was held unconstitutional for impacting the federal government's foreign affairs powers. *Zschernig*, 389 U.S. at 440.

Finally, defendant's argument confuses the preemption doctrine with the foreign affairs power. A state cannot pass statutes that interfere with foreign affairs whether or not the national government has a stated policy. *See Pink*, 315 U.S. at 233 ("Power over external affairs is not shared by the States; it is vested in the national government exclusively.")

Defendant cites to *Clark* v. *Allen*, 331 U.S. 503, 91 L. Ed. 1633, 67 S. Ct. 1431 (1947), in support of his argument that plaintiffs must articulate a specific national policy violated by the HVIRA. *Clark*, however, does not stand for such a proposition. In *Clark*, the Supreme Court held that, generally,

rights to succession are determined by local law. However, those rights may be affected by an overriding federal policy. *See id.* at 517. In *Clark*, the Court did not find an overriding federal policy, nor did the Court find that the statute had anything more than an "incidental and indirect effect in foreign countries." *See id.* Therefore, the statute did not impermissibly intrude on foreign affairs powers. *Clark* did not require that there be an overriding federal policy. The Supreme Court simply found that there was none.

Defendant further argues that the German Foundation and the ICHEIC are not as comprehensive as the HVIRA with regard to reporting. Defendant points out that the German Foundation does not have a reporting requirement and that the ICHEIC, as a voluntary organization, does not encompass all the insurance companies addressed by the HVIRA. These assertions may be true. However, foreign affairs remains the province of the national government; the states do not have authority to fill in perceived gaps in international measures as they see fit. The United States must be able to speak with one voice on matters of international concern.

3. *More than an Incidental Effect on Foreign Countries*

Defendant argues that the effect is on foreign companies, not foreign governments, and thus the HVIRA does not violate the foreign affairs policy. The language of *Zschernig* requires that the statute have "more than some incidental or indirect effect in foreign *countries*," not foreign governments. *Zschernig*, 389 U.S. at 434. "Experience has shown that international controversies of the gravest moment, sometimes even leading to war, may arise from real or imagined wrongs to another's subjects inflicted, or permitted by a government." *Zschernig* 389 U.S. at 441 (quoting *Hines* 312 U.S. at 64).

Plaintiffs have demonstrated a probability of success in showing that the HVIRA has more than some incidental effect in foreign countries. In addition to the interference with foreign

commerce and the interference with foreign relations, the immediate effect of the statute is to require foreign companies to do an extensive search of warehouses and then compile a massive report, even if the company's only connection with California is through a subsidiary.

Plaintiffs have also raised a serious issue that the statutes are in conflict with some European Privacy laws. For example, in its Amicus brief, the Federal Republic of Germany argues that the disclosure of information and documentation by German insurers to the California Insurance Department without the express authorization of policyholders or their beneficiaries could place the German insurers in violation of the Bundesdatenschutzgesetz (German Federal Data Protection Act, "BDSG"). Federal Republic of Germany Amicus Brief at 6). Violation of the BDSG "may result in criminal as well as civil penalties." (Federal Republic of Germany Amicus Brief at 6). Gerling submits the Declaration of Dr. Spiros Simitis, a professor at Yale Law School and a former Data Protection Commissioner of the German State of Hesse. After an extensive analysis of the BDSG, Simitis states that "under present conditions, [Gerling's] German affiliates are not allowed to transfer the data requested." (Gerling: Reif Decl. Ex. 10, Simitis Decl. ¶ 28)[12]

Defendant argues that in fact, the HVIRA and related statutes do not conflict with the BDSG. Defendant submits the declaration of Paul Schwartz, a professor at Brooklyn Law School. Schwartz states that he has been recognized as an expert on data protection law. He disagrees with Simitis' final conclusion and gives his own lengthy interpretation of the

[12] Simitis also notes that European Union has a Data Protection Directive which "explicitly affirms the individual's right to determine the use of her or his data." (Gerling Reif Decl. Ex. 10, Simitis Decl.¶ 11).

BDSG. (Opp'n.: Schwartz Decl. ¶ 6).[13]

There is an obvious dispute as to whether the HVIRA conflicts with the German BDSG and other European laws. The very fact that a state law requires a foreign company to do something that arguably violates the laws of the countries in which it is incorporated or does business shows that the law has an effect on international relations which is more than "incidental."

Plaintiffs have made a persuasive showing that the HVIRA interferes with foreign relations, has great potential for disruption or embarrassment, and has more than an incidental effect in foreign countries. Accordingly, plaintiffs have shown a probability of success on their claim that the HVIRA interferes with the federal government's control over foreign affairs.[14]

[13] Defendant also argues that the ICHEIC has already published the names of some German companies policyholders on its website. Defendant argues that it "defies logic" that the ICHEIC would violate German laws. The question is not before the court as to whether the ICHEIC's actions violated German laws.

[14] Defendant cites *Trojan Technologies* v. *Commonwealth of Pennsylvania*, 916 F.2d 903 (3rd Cir. 1990) in an attempt to distinguish *Zschernig*. In *Trojan*, the Third Circuit examined a Pennsylvania "buy American" statute. This statute required agencies of the Commonwealth when constructing public works to include a provision in all contracts that steel used in the projects must be produced in the United States. *See id.* at 904. The Third Circuit found this statute did not interfere with the federal government's exercise of the Foreign Affairs power because "[t]he Pennsylvania statute exhibits none of the dangers attendant on the statute reviewed in *Zschernig*." *Id.* at 913. The Third Circuit noted that the statute was evenhanded in its application, applying to steel from any foreign source "without respect to whether the source country might be considered friend of foe." *Id.* Here, while the HVIRA is arguably evenhanded, it does exhibit other "dangers" not at issue in *Trojan*, and thus violates the Foreign Affairs power. Among other things, the HVIRA is inconsistent with several of the national government's statements, policies, and promises, and it potentially violates foreign laws. Thus, it affects foreign relations, is potentially disruptive and

B. *Commerce Clause*

The Commerce Clause reserves to Congress the right "to regulate commerce with foreign Nations, and among the several States . . . ." U.S. Const. art. 1, § 8, cl. 3. "[E]ven in the absence of specific action taken by the Federal Government," the Commerce Clause limits the powers of states to enact laws regulating interstate or foreign commerce. *Wardair Canada, Inc.* v. *Florida Dep't. of Revenue*, 477 U.S. 1, 7-8, 106 S. Ct. 2369, 91 L. Ed. 2d 1 (1986).

1. *McCarran-Ferguson Act*

State regulation and taxation of insurance is often excepted from Commerce Clause restrictions through the McCarran-Ferguson Act. This Act was passed in the wake of *United States* v. *South-Eastern Underwriters Association*, 322 U.S. 533, 88 L. Ed. 1440, 64 S. Ct. 1162 (1944), which held that insurance is "commerce" within the meaning of the Commerce Clause. *See Western and Southern Life* v. *State Board of Equalization of Cal.*, 451 U.S. 648, 653-654, 68 L. Ed. 2d 514, 101 S. Ct. 2070 (1981). Congress, believing "that the business of insurance is a local matter, to be subject to and regulated by the laws of the several States," enacted the McCarran-Ferguson Act, which Congress intended to restore state taxing and regulatory powers over the insurance business to their pre *South-Eastern Underwriters* scope. *See id.* at 654 (quoting H.R. Rep. No. 143, 79th Cong., 1st Sess., 2). Specifically, the Act states, "the business of insurance, and every person engaged therein, shall be subject to the laws of the several States which relate to the regulation or taxation of such business." 15 U.S.C. § 1012(a).

Defendant thus argues that the HVIRA is exempted from Commerce Clause restrictions by the McCarran-Ferguson Act. The HVIRA, however, does not appear to fall within the scope

---

embarrassing, and has more than incidental effects in foreign countries.

of regulations intended to be exempted by the Act.

In *Federal Trade Commission* v. *Travelers Health Association*, 362 U.S. 293, 4 L. Ed. 2d 724, 80 S. Ct. 717 (1960), the Supreme Court held that the Federal Trade Commission could issue a cease and desist order against certain insurance practices by a Nebraska insurance company. The company's activities, selling insurance through an interstate mail order insurance business, were extraterritorial, and thus were not regulated by state law within the meaning of the McCarran-Ferguson Act. *See id.* at 298. Thus, the insurance practices were not immune from federal control. The court stated that it is clear from the debate surrounding the implementation of the McCarran-Ferguson Act "that Congress viewed state regulation of insurance solely in terms of regulation by the law of the State where occurred the activity sought to be regulated. There was no indication of any thought that a State could regulate activities carried on beyond its own borders." *Id.* at 300.

The Ninth Circuit discussed the holding in *Travelers* in its opinion in *In re Insurance Antitrust Litigation* v. *Ace Check Cashing Inc.*, 938 F.2d 919 (1991), *aff'd in part, rev'd in part* by *Hartford Fire Ins. Co.* v. *California*, 509 U.S. 764, 125 L. Ed. 2d 612, 113 S. Ct. 2891 (1993). "[E]stablished law blocks regulation by one state of the United States of the insurance business outside the borders of that state." 938 F.2d at 928. "[A] state does not have power to regulate in any way contracts of insurance or reinsurance entered into outside its jurisdiction even though the risks covered were risks within the state." *Id.*

Here, the HVIRA attempts to regulate the decision making authority of European insurance companies to pay or not to pay claims on European policies. *See* Cal. Ins. Code. § 13801(f) ("This chapter is necessary to . . . encourage the development of a resolution to these [Holocaust era insurance claim] issues through the international process or through direct action by the State of California."). The HVIRA specifically asks for

information about insurance policies sold "directly or through a related company, to persons in Europe, which were in effect between 1920 and 1945." Cal. Ins. Code § 13804(a). Clearly the "State where occurred the activity sought to be regulated" was not California. *Travelers*, 362 U.S. at 300.

Further, in discussing the passage of the McCarran-Ferguson Act, the Supreme Court stated, "one of the major arguments advanced by proponents of leaving regulation to the States was that the States were in close proximity to the people affected by the insurance business and, therefore, were in a better position to regulate that business than the Federal Government." *Id.* at 302. Although some of the people affected by the HVIRA may now be California residents, the HVIRA makes no distinction between reporting insurance policies related to California residents and insurance policies related to residents of any other state or foreign county. There is no legitimate reason why California should regulate the reporting of these policies.

Under *SEC* v. *National Secur. Inc.*, 393 U.S. 453, 460, 21 L. Ed. 2d 668, 89 S. Ct. 564 (1969), licensing companies is considered the "business of insurance" within the meaning of the McCarran-Ferguson Act. However, the gist of the HVIRA is not about licensing insurance companies, but rather about forcing companies to report on insurance policies issued in Europe and using the threat of license suspension as an enforcement mechanism.

The McCarran-Ferguson Act does not insulate the HVIRA from analysis under the Commerce Clause.

2. *Violations of the Commerce Clause*

Plaintiffs have shown a probability that the HVIRA violates the Commerce Clause. Although there is only one Commerce Clause, "state restrictions burdening foreign commerce are subjected to a more rigorous and searching scrutiny" than are regulations on interstate commerce. *South-*

Central Timber Dev., Inc. v. *Wunnicke*, 467 U.S. 82, 100, 81 L. Ed. 2d 71, 104 S. Ct. 2237 (1984). The section of the commerce clause dealing with foreign commerce is often referred to as "the Foreign Commerce Clause."

a. *One Voice*

The Foreign Commerce Clause is a subset of the broader foreign affairs powers discussed above. "Foreign commerce is pre-eminently a matter of national concern." *Japan Line, LTD.* v. *County of Los Angeles*, 441 U.S. 434, 448, 60 L. Ed. 2d 336, 99 S. Ct. 1813 (1979). "In international relations and with respect to foreign intercourse and trade the people of the United States act through a single government with unified and adequate national power." *Id.* "The Federal Government must speak with one voice when regulating commercial relations with foreign governments." *Id.*

The HVIRA potentially prevents the federal government from speaking with one voice in its expectations of foreign insurance companies. Under the HVIRA, foreign insurance companies must conduct an extensive and thorough search for records. *See* Cal. Ins. Code §§ 13804(a) and 13804(b). Further, the companies must certify whether or not claims of Holocaust victims have been paid, and must certify whether or not they have searched for the victims. *See* Cal. Ins. Code § 13804(b). These demands emanate not from the national government, but from an individual state, and would be in conflict with the national government's promises to Germany that the German Foundation would be the exclusive relief for claims from Holocaust victims.[15]

---

[15] Defendant points out that commerce is controlled by Congress, not the Executive Branch. *See Barclays Bank* v. *Franchise Tax Bd.*, 512 U.S. 298, 329, 129 L. Ed. 2d 244, 114 S. Ct. 2268 (1994). However, Congress "may delegate very large grants of its power over foreign commerce to the President, who also possesses in his own right certain powers conferred by the Constitution on him as Commander-in-Chief and as the Nation's organ in foreign affairs." *Id.* (internal quotations omitted).

3. *Commerce Outside State Borders*

The Commerce Clause "precludes the application of a state statute to commerce that takes place wholly outside of the State's borders, whether or not the commerce has effects within the State." *Healy* v. *Beer Ins.*, 491 U.S. 324, 105 L. Ed. 2d 275, 109 S. Ct. 2491 (1989). Defendant argues that the commerce does not take place wholly outside of California's borders. "The critical question is whether the practical effect of the regulation is to control conduct beyond the boundaries of the State." *Id.* (citing *Brown Forman Distillers Corp.* v. *New York State Liquor Auth.*, 476 U.S. 573, 579, 90 L. Ed. 2d 552, 106 S. Ct. 2080 (1986).

The practical effect of the HVIRA is that insurance companies that sold policies during the applicable time period must make an extensive search of their warehouses to come up with a list of individuals that might include Holocaust victims. It is common sense that most, if not all, of the companies that sold policies in Europe from 1920-1945 were European. They are being asked to gather voluminous European records of policies sold to Europeans and to report these records to California. The required records are not in any way tailored toward California citizens. The only connection to California is that the statute is enforced by taking away the company's or its affiliate's California license and the reporting is done to California. Clearly, California is meddling in foreign commerce entirely outside its borders.

Plaintiffs have shown a probability of success on the merits that the HVIRA violates the Commerce Clause.

C. *Other Constitutional Claims*

Because the court finds that plaintiffs have demonstrated a probability of success on the merits that the HVIRA is unconstitutional based on a violation of the federal foreign affairs power and a violation of the Commerce Clause, the court does not address the remaining constitutional issues.

IV. *Irreparable Injury*

It is the plaintiff's burden to demonstrate that the balance of irreparable harm favors the plaintiff. *See Carribean Marine Servs. Co.* v. *Baldridge*, 844 F.2d 668, 674 (9th Cir. 1988). "Speculative injury does not constitute irreparable injury sufficient to warrant granting a preliminary injunction . . . a plaintiff must demonstrate immediate threatened injury as a prerequisite to preliminary injunctive relief." Plaintiffs have met this burden.

The required reports under California Insurance Code section 13804 were due April 7, 2000. *See* Cal. Code Regs. § 2278. Under section 13806, if the parties did not file the reports by May 7, 2000, the Commissioner "shall suspend the certificate of authority to conduct insurance business in the state." Cal. Ins. Code § 13806.

Plaintiffs have demonstrated that suspension of their licenses to practice insurance in the state of California would cause them irreparable harm. Such suspension could undermine the goodwill of the company because the market may infer that the company is unstable. Further, a suspension would prevent plaintiffs from being able to renew contracts for their existing policy holders causing further loss of goodwill. *See Rent-a-Center, Inc.* v. *Canyon Television and Appliance*, 944 F.2d 597, 603 (9th Cir. 1991) (affirming preliminary injunction and holding that damage to the goodwill of a business supports a finding of irreparable injury).

In addition, suspension is likely to cause reputational injury resulting in a loss of market share. *See United Services Automobile Ass'n* v. *Muir*, 792 F.2d 356, 362 (3rd Cir. 1986) Suspension might suggest marketplace fraudulent or illegal activity or financial instability. *See id.* Plaintiffs point out that suspending their licenses will imply publicly that the companies are implicated with the wrongdoings of the Holocaust, has acted illegally, or is not financially sound. Indeed, the Commissioner has already made such implications.

For example, the California Department of Insurance has a website. One page is dedicated to Winterthur. Next to Winterthur is a picture of a concentration camp. The caption reads, "This company is an affiliate of one of what could be many companies that have outstanding, unpaid claims owed to Holocaust survivors, their heirs and beneficiaries, for life and property loss resulting from the atrocities committed during the Holocaust. It is time for justice." (Winterthur: Smith Decl. Ex 1; *http://www.insurance.ca.gov/docs/FS-Holocaust.htm.* Suspending Winterthur's license would further implicate the company, causing irreparable harm. *See Ross-Simons, Inc.* v. *Baccarat, Inc.*, 102 F.3d 12, 20 (1st Cir. 1996) ("By its very nature injury to goodwill and reputation is not easily measured or fully compensable in damages. Accordingly, this kind of harm is often held to be irreparable.")

The public interest is also an important factor to be considered in a suit for injunctive relief affecting the public interest. *See Miller* v. *California Pac. Med. Ctr.*, 991 F.2d 536, 540 (9th Cir. 1993). If plaintiffs' licenses are suspended, the companies would not be able to write any new business in California. Although they would be obligated to service claims on existing policies until those policies expired by their natural terms, the companies would not be able to modify or renew the existing policies. For example, if a policyholder wanted to increase her policy limits, she would not be able to do so.

In many cases, the existing policy will expire within the year. At the end of the year, policyholders will be scrambling to find new insurers. This task could become more difficult due to the decreased number of insurance companies in the state as a result of the suspension provisions of the HVIRA.

Finally, license suspension would undoubtably affect the insurance companies' employees. Companies that could no longer write policies in California would likely have to lay off or fire their employees engaged in underwriting and sales. Plaintiffs have demonstrated that irreparable harm will likely

occur if the HVIRA is enforced.

V. *Conclusion*

None of the plaintiffs deny that the Holocaust was a terrible atrocity. And none of the plaintiffs deny that the victims and their heirs and beneficiaries should be compensated to the extent possible. However, even though the end goal of such compensation is laudable, this goal may not be achieved through unconstitutional means. Plaintiffs have shown a probability of success on the merits of their claim and have shown that irreparable harm will occur if the court does not enjoin enforcement of the HVIRA.

IT IS THEREFORE ORDERED that plaintiffs motions for preliminary injunction be, and the same hereby are, GRANTED.

Pending final judgment in these actions, defendant is enjoined from enforcing the provisions of the Holocaust Victim Insurance Relief Act and the accompanying regulations. Cal. Ins. Code §§ 13800-13807 and Cal. Code Regs. §§ 2278-2278.5.

DATED: June 9, 2000

William B. Shubb /s/
WILLIAM B. SHUBB
UNITED STATES DISTRICT JUDGE

APPENDIX E

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Due Process Clause, U.S. CONST. amend. XIV, § 1, provides in relevant part that no State shall "deprive any person of life, liberty, or property, without due process of law."

The Commerce Clause, U.S. CONST. art. I, § 8, cl. 3, provides in relevant part that "The Congress shall have Power * * * To regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes."

The provision of the McCarran-Ferguson Act, 15 U.S.C. §§ 1011-1015, relevant to this case states:

§ 1012. Regulation by State law; Federal law relating specifically to insurance; applicability of certain Federal laws after June 30, 1948

(a) State regulation

The business of insurance, and every person engaged therein, shall be subject to the laws of the several States which relate to the regulation or taxation of such business.

(b) Federal regulation

No Act of Congress shall be construed to invalidate, impair, or supersede any law enacted by any State for the purpose of regulating the business of insurance, or which imposes a fee or tax upon such business, unless such Act specifically relates to the business of insurance: *Provided*, That after June 30, 1948, the Act of July 2, 1890, as amended, known as the Sherman Act, and the Act of October 15, 1914, as amended, known as the Clayton Act, and the Act of September 26, 1914, known as the Federal Trade Commission Act, as amended, shall be applicable to the business of insurance to the extent that such business is not regulated by State Law.

The California Holocaust Victim Insurance Relief Act of 1999, Cal. Ins. Code §§ 13800-13807, was enacted as part of the following legislation:

Assembly Bill No. 600

CHAPTER 827

An act to amend Section 354.5 of the Code of Civil Procedure, and to add Chapter 4 (commencing with Section 13800) to Division 3 of the Insurance Code, relating to insurance claims of Holocaust victims, making an appropriation therefor, and declaring the urgency thereof, to take effect immediately.

[Approved by Governor October 8, 1999. Filed

with Secretary of State October 10, 1999.]

LEGISLATIVE COUNSEL'S DIGEST

AB 600, Knox. Insurance claims of Holocaust victims.

(1) Existing law prescribes certain powers and duties of the Insurance Commissioner and of the Department of Insurance. Existing law requires the department to develop and implement a coordinated approach to gather, review, and analyze the archives of insurers and other archives and records, as specified, to provide for research and investigation into insurance policies, unpaid insurance claims, and related matters of victims of the Holocaust or the Nazi-controlled German government or its allies, and the beneficiaries and heirs of those victims, and for losses arising from the activities of the Nazi-controlled German government or its allies for insurance policies issued before and during World War II by insurers who have affiliates or subsidiaries authorized to do business in the state.

Existing law also provides that the department has an affirmative duty to play an independent role in representing the interests of Holocaust survivors, and provides that if an insurer

or any affiliate of an insurer has failed to pay any valid claim from Holocaust survivors, the certificate of authority of the insurer shall be suspended until the insurer, or its affiliates, pays the claim or claims.

This bill would, in addition, enact the Holocaust Victim Insurance Relief Act of 1999, which would, among other things, require the commissioner to establish and maintain the Holocaust Era Insurance Registry, which would contain records and information relating to insurance policies issued by insurers in the state, either directly or through a related company, to persons in Europe which were in effect between 1920 and 1945. This bill would require those insurers to file or cause to be filed that information with the commissioner to be entered into the registry. It would also require those insurers to certify as true certain additional information, and would make it a crime to knowingly certify as true any material matter which the insurer knows to be false. By creating a new crime, this bill would impose a state-mandated local program. This bill would also provide for certain civil penalties for knowingly filing false information about a policy, as required by these new provisions. The bill would appropriate these civil penalties from the General Fund to the Department of Insurance to be used to aid in the resolution of Holocaust insurance claims. It would also require the commissioner to suspend the certificate of authority of any insurer that fails to comply with these requirements by the 210th day of the effective date of these provisions, and to adopt emergency rules to implement these provisions.

(2) Existing law authorizes any Holocaust victim, as defined, or heir or beneficiary of a Holocaust victim, who resides in this state and has a claim arising out of an insurance policy or policies purchased in Europe between 1920 and 1945 from a specified insurer to bring a legal action to recover on that claim in any superior court of the state for the county in which the plaintiff or one of the plaintiffs resides, which shall be vested with jurisdiction over that action until its completion

or resolution. Existing law also provides that any claim of this type shall not be dismissed for failure to comply with the applicable statute of limitation if the action is commenced on or before December 31, 2010.

This bill would instead authorize those persons to bring a legal action to recover on a claim arising out of an insurance policy or policies purchased or in effect in Europe before 1945 from a specified insurer, and would change the definition of "Holocaust victim" and "insurer," as specified.

(3) The California Constitution requires the state to reimburse local agencies and school districts for certain costs mandated by the state. Statutory provisions establish procedures for making that reimbursement.

This bill would provide that no reimbursement is required by this act for a specified reason.

(4) This bill would declare that it is to take effect immediately as an urgency statute.

Appropriation: yes.

The people of the State of California do enact as follows:

SECTION 1. Section 354.5 of the Code of Civil Procedure is amended to read:

354.5. (a) The following definitions govern the construction of this section:

(1) "Holocaust victim" means any person who was persecuted during the period of 1929 to 1945, inclusive, by Nazi Germany, its allies, or sympathizers.

(2) "Related company" means any parent, subsidiary, reinsurer, successor in interest, managing general agent, or affiliate company of the insurer.

(3) "Insurer" means an insurance provider doing business in the state, or whose contacts in the state satisfy the

constitutional requirements for jurisdiction, that sold life, property, liability, health, annuities, dowry, educational, casualty, or any other insurance covering persons or property to persons in Europe at any time before 1945, directly or through a related company, whether the sale of the insurance occurred before or after the insurer and the related company became related.

(b) Notwithstanding any other provision of law, any Holocaust victim, or heir or beneficiary of a Holocaust victim, who resides in this state and has a claim arising out of an insurance policy or policies purchased or in effect in Europe before 1945 from an insurer described in paragraph (3) of subdivision (a), may bring a legal action to recover on that claim in any superior court of the state for the county in which the plaintiff or one of the plaintiffs resides, which court shall be vested with jurisdiction over that action until its completion or resolution.

(c) Any action brought by a Holocaust victim or the heir or beneficiary of a Holocaust victim, whether a resident or nonresident of this state, seeking proceeds of the insurance policies issued or in effect before 1945 shall not be dismissed for failure to comply with the applicable statute of limitation, provided the action is commenced on or before December 31, 2010.

SEC. 2. Chapter 4 (commencing with Section 13800) is added to Division 3 of the Insurance Code, to read:

CHAPTER 4. HOLOCAUST ERA INSURANCE REGISTRY

13800. This chapter shall be known and may be cited as the Holocaust Victim Insurance Relief Act of 1999.

13801. The Legislature finds and declares the following:

(a) During World War II, untold millions of lives and property were destroyed.

(b) In addition to the many atrocities that befell the

victims of the Nazi regime, insurance claims that rightfully should have been paid out to the victims and their families, in many cases, were not.

(c) In many instances, insurance company records are the only proof of insurance policies held. In some cases, recollection of those policies' very existence may have perished along with the Holocaust victims.

(d) At least 5,600 documented Holocaust survivors are living in California today. Many of these survivors and their descendents have been fighting for over 50 years to persuade insurance companies to settle unpaid or wrongfully paid claims. Survivors are asking that insurance companies come forth with any information they possess that could show proof of insurance policies held by Holocaust victims and survivors, in order to ensure that closure on this issue is swiftly brought to pass.

(e) Insurance companies doing business in the State of California have a responsibility to ensure that any involvement they or their related companies may have had with insurance policies of Holocaust victims are disclosed to the state and to ensure the rapid resolution of these questions, eliminating the further victimization of these policyholders and their families.

(f) The international Jewish community is in active negotiations with responsible insurance companies through the International Commission on Holocaust Era Insurance Claims to resolve all outstanding insurance claims issues. This chapter is necessary to protect the claims and interests of California residents, as well as to encourage the development of a resolution to these issues through the international process or through direct action by the State of California, as necessary.

13802. For purposes of this chapter, the following definitions shall apply:

(a) "Holocaust victim" means any person who was persecuted during the period of 1929 to 1945, inclusive, by

Nazi Germany, its allies, or sympathizers.

(b) "Related company" means any parent, subsidiary, reinsurer, successor in interest, managing general agent, or affiliate company of the insurer.

(c) "Proceeds" means the face value or other payout value of insurance policies and annuities plus reasonable interest to date of payment without diminution for wartime or immediate postwar currency devaluation.

13803. The commissioner shall establish and maintain within the department a central registry containing records and information relating to insurance policies, as described in Section 13804, of Holocaust victims, living and deceased. The registry shall be known as the Holocaust Era Insurance Registry. The Attorney General, in coordination with the department, shall establish appropriate mechanisms to ensure public access to the registry.

13804. (a) Any insurer currently doing business in the state that sold life, property, liability, health, annuities, dowry, educational, or casualty insurance policies, directly or through a related company, to persons in Europe, which were in effect between 1920 and 1945, whether the sale occurred before or after the insurer and the related company became related, shall, within 180 days following enactment of this act, file or cause to be filed the following information with the commissioner to be entered into the registry:

(1) The number of those insurance policies.

(2) The holder, beneficiary, and current status of those policies.

(3) The city of origin, domicile, or address for each policyholder listed in the policies.

(b) In addition, each insurer subject to subdivision (a) shall certify to any of the following:

(1) That the proceeds of the policies described in subdivision (a) have been paid to the designated beneficiaries or their heirs where that person or persons, after diligent search, could be located and identified.

(2) That the proceeds of the policies where the beneficiaries or heirs could not, after diligent search, be located or identified, have been distributed to Holocaust survivors or to qualified charitable nonprofit organizations for the purpose of assisting Holocaust survivors.

(3) That a court of law has certified in a legal proceeding resolving the rights of unpaid policyholders, their heirs, and beneficiaries, a plan for the distribution of the proceeds.

(4) That the proceeds have not been distributed and the amount of those proceeds.

An insurer who certifies as true any material matter pursuant to this subdivision, which the insurer knows to be false, is guilty of a misdemeanor.

(c) An insurer currently doing business in the state that did not sell any insurance policies in Europe prior to 1945, shall not be subject to this section if a related company, whether or not authorized and currently doing business in the state, has made a filing under this section.

13805. Any insurer that knowingly files information about a policy required by this chapter that is false shall, with respect to that policy, be liable for a civil penalty not to exceed five thousand dollars ($5,000), which penalty is hereby appropriated to the department to be used by it to aid in the resolution of Holocaust insurance claims.

13806. The commissioner shall suspend the certificate of authority to conduct insurance business in the state of any insurer that fails to comply with the requirements of this chapter by the 210th day after this section becomes effective, until the time that the insurer complies with this chapter.

13807. The commissioner shall adopt rules to implement this chapter within 90 days of its effective date. The rules shall be adopted as emergency regulations in accordance with Chapter 3.5 (commencing with Section 11340) of the Government Code, and for the purposes of that chapter, including Section 11349.6 of the Government Code, the adoption of the rules shall be considered by the Office of Administrative Law to be necessary for the immediate preservation of the public peace, health and safety, and general welfare.

SEC. 3. No reimbursement is required by this act pursuant to Section 6 of Article XIII B of the California Constitution because the only costs that may be incurred by a local agency or school district will be incurred because this act creates a new crime or infraction, eliminates a crime or infraction, or changes the penalty for a crime or infraction, within the meaning of Section 17556 of the Government Code, or changes the definition of a crime within the meaning of Section 6 of Article XIII B of the California Constitution.

SEC. 4. This act is an urgency statute necessary for the immediate preservation of the public peace, health, or safety within the meaning of Article IV of the Constitution and shall go into immediate effect. The facts constituting the necessity are:

In order to establish the Holocaust Era Insurance Registry and to ensure the resolution of claims under insurance policies held by Holocaust victims and survivors at the earliest possible time, it is necessary that this act take effect immediately.

APPENDIX F

THE DEPUTY SECRETARY OF THE TREASURY

Washington

November 30, 1999

The Honorable Gray Davis
Governor
State Capitol Building
Sacramento, CA 95814

Dear Governor Davis:

I am confident that the motivation behind the California Holocaust Victim Insurance Relief Act of 1999 is a genuine commitment to justice for Holocaust victims and their families. However, honorable intentions do not necessarily translate into effective results. The subpoenas by California Insurance Commissioner Quackenbush served on several subsidiaries of European insurance companies engaged in the International Commission on Holocaust Era Insurance Claims, that includes the California Commissioner, could undermine the Commission as it prepared to launch a claims process. The Commission, built through long and arduous negotiations, holds tangible and immediate promise to providing that California's legislation attempts to seek, relief for Holocaust victims.

Permit me to explain. For four years, I have been directing the Administration's broad-based effort to bring some measure of justice to Holocaust victims and their families, especially those victims for whom no previous relief was provided and to those whose claims fell between the cracks of existing programs. While my efforts have ranged from stolen art, to communal property, to clocked bank accounts, my focus over the last eight months has been on obtaining dignified monetary recognition of the suffering of hundreds of thousands of former slave and forced laborers during the Nazi era. Many of these people are now American citizens.

I have been facilitating negotiations among class action lawyers representing some of the victims, the governments of Central and Eastern European countries and the State of Israel, Jewish organizations, representatives of German industry (including insurance companies), and the German government. Despite the incredible complexity of these negotiations, we have made progress toward a settlement, although subsequent hurdles must be overcome. All of the elements are ready to fall into place: the definition of the several classes of beneficiaries, agreement on the numbers of beneficiaries, the payment mechanisms, and the essential "legal peace" that will be offered to German industry once a settlement is agreed. The key remaining issue is the final size of the financial package, and we have dramatically narrowed the gap between the two sides to what I believe is a bridgeable difference.

Clearly, for this deal to work — and I emphasize that we are talking about providing a dignified payment to elderly beneficiaries whose numbers approach perhaps over 1.5 million persons — German industry and the German government need to be assured that they will get "legal peace", not just from class-action lawsuits, but from the kind of legislation represented by the California Victim Insurance Relief Act.

I know that some could argue that California will need to make a judgment on whether its requirements have been met once a final agreement with the Germans has been reached. I will be very comfortable defending what I hope those negotiations will accomplish. However, you should know that actions by California, pursuant to this law, have already potentially damaged and could detail both a settlement of the forced and slave labor negotiations and the progress already achieved by the International Commission on Holocaust Era Insurance Claims, chaired by former Secretary of State Lawrence Eagleburger.

I have written to Commissioner Quackenbush about the subpoenas issued under the California Victim Insurance Relief

Act aimed at determining whether the companies intend to comply with the law at some future date and am pleased to share this letter with you. Chairman Eagleburger has expressed his opposition to sanctions and other pressures brought by California on companies from whom he is obtaining real cooperation and from whom Holocaust survivors — some of them citizens of California — stand to benefit. I strongly support the International Commission's efforts to create a claims adjudication process and must emphasize that those companies cooperating with the Commission deserve safe haven from sanctions and subpoenas under California legislation.

With regard to slave and forced labor negotiations, we German companies have already pledged to raise DM 5 billion to pay all those who were forced to work for all German companies, not just their own workers, regardless of whether those companies still exist or are able to contribute to the fund. The German government has pledged DM 3 billion. But when these same companies tell us they or their subsidiaries are subpoenaed pursuant to California's Holocaust law, they wonder why they are cooperating.

Governor Davis, we are close to agreement on both the slave and forced labor claims and insurance claims process. I ask for your help, to continue the "safe harbor" from subpoenas and sanctions for participating insurance companies while we seek to finalize both of these negotiations in these next few critical weeks.

Very truly yours,

/s/

Stuart E. Eizenstat

Attachment: as stated

APPENDIX G

TREASURY NEWS

OFFICE OF PUBLIC AFFAIRS • 1500 PENNSYLVANIA AVENUE, N.W. • WASHINGTON, D.C. • 20220 • (202) 622-2960

EMBARGOED UNTIL 2 P.M. EDT
Text as Prepared for Delivery
April 5, 2000

Deputy Treasury Secretary Stuart E. Eizenstat
Special Representative of the Secretary of State and
the President on Holocaust-Related Issues
Senate Foreign Relations Committee

Mr. Chairman, Senator Biden, I appreciate the opportunity to testify today. The effort of the U.S. Congress to provide a public forum for the discussion of Holocaust-related matters over the past several years has been a powerful asset in our work to bring justice, however belated, to Holocaust survivors and other victims of World War II and to bring out long-suppressed truths about World War II and Holocaust-era assets.

You have just heard one of the true witnesses of the Holocaust, Elie Weisel. No one can exceed his eloquence and his towering moral stature on this subject.

The Holocaust was not only the worst genocide in history, but also perhaps history's greatest theft. In order to operate their war machine, the Nazis stole the gold from the treasuries of the nations they occupied; took the valuables of the people they killed, including gold from their victims' teeth; looted the museums and private art collections of Europe of over an estimated 600,000 works of art; and forced some twelve million people to work in their factories and fields, under terrible conditions and for little or no pay, to free German workers to

serve in the military. Jewish businesses were "Aryanized" — that is seized from their owners and turned over to others often with the complicity of German banks. Jews were forced to sell their homes for little or no compensation. Their personal property was stripped from them before they were sent off to the camps. Their communal property — synagogues, cultural centers, schools, and cemeteries — was confiscated and most of it destroyed.

Over the last several years, our government has been trying in cooperation with other governments and many private organizations, to bring some measure of justice to surviving victims and their families by recovering property that was stolen from them, by enforcing their rights under insurance contracts that were abrogated, by compensating them for personal injuries sustained and for slave labor and forced labor performed under brutal conditions. Over one hundred thousand Holocaust survivors, and tens of thousands of other Americans who were forced laborers during the War live in the United States. These issues have great significance to them. Our policy on Holocaust issues also serves important U.S. foreign policy interests, such as maintaining close relations with Germany, a partner of ours in promoting and defending democracy for the last fifty years and a nation that is vital to both the security and economic development of Europe and, with Switzerland, a major trading partner. It also helps in the removal of impediments to greater cooperation and unity among the nations of that continent. More broadly, the horrors of the Holocaust provided a lesson applicable to contemporary events. The firm action of the United States and NATO in Kosovo were motivated, in part, by an unwillingness to repeat the world's indifference to the plight of peoples subjected to genocidal persecution. UN judicial tribunals dealing with Rwanda and Kosovo build on the precedent of the Nuremberg trials. The bipartisan focus on human rights violations, from Chechnya to China, resonates with Holocaust-related issues.

Slave and Forced Labor and Other Wrongs

I would like to start with the current negotiations over slave and forced labor and other wrongs. The parties to these negotiations include the Conference on Jewish Material Claims against Germany, the lawyers for the victims, and the Governments of Belarus, the Czech Republic, Poland, Russia, Ukraine and the State of Israel. The United States Government, represented by myself, and the German government, represented by Count Otto Lambsdorff, co-chair the talks. They are focused on the establishment and funding of a new entity, to be created by the Federal Republic of Germany, to be called the Foundation for Remembrance, Responsibility and the Future. Through this Foundation Initiative, those who worked as forced and slave laborers and those who suffered at the hands of German companies during the Nazi era can receive recognition of their suffering and dignified payments.

These negotiations, which have been ongoing for the last year, through eleven formal negotiating rounds and innumerable other informal sessions, are proceeding in four phases: (1) agreement on the total amount of money available to the Foundation; (2) agreement on the allocation of that sum among different categories of claims and, in the case of forced and slave labor claims, by country; (3) legislation that must be passed by the Bundestag creating the Foundation and confirming the agreements made during the negotiation; and (4) an undertaking by the United States, to be confirmed in an Executive Agreement between our government and the German government, that it will support "legal peace" for German companies in the following manner: in any actions brought against German industry arising out of the Nazi era, our government will file in court a Statement of Interest requesting that, assuming the establishment of a comprehensive Foundation, the Foundation be the exclusive remedy for Nazi-era claims against German companies and that dismissal of such cases is in the U.S. foreign policy interest.

Last December, after hard negotiation, the first phase was completed. The German companies and government agreed to raise their combined contribution to the Foundation's capitalization to 10 billion DM, half from German companies and half from the German government. This amounts to approximately $5 billion under current exchange rates. That sum will cover all World War II injuries committed by German companies, including slave and forced labor to insurance, banking, Aryanized property and medical experiments. This offer was a substantial increase over the initial German proposal of 1.5 billion DM at the beginning of the process, 6 billion DM in October and a subsequent offer of 8 billion DM in November. All the parties to these negotiations accepted the 10 billion DM offer as the capped amount for the German Foundation and the sum that will resolve the lawsuits.

Two weeks ago, in Berlin, after another long and arduous negotiation, we successfully completed the second phase, an agreement on allocation, I would like to spell it out in some detail.

Of the 10 billion DM, 8.1 billion plus 50 million in anticipated interest earnings will be allocated to pay claims to slave and forced laborers and to others for personal injuries. One billion will go to property claims and insurance claims, as well as property and insurance humanitarian funds. 700 million DM will go into a Future Fund the purpose of which will be to promote tolerance and advance social programs, taking into account the heirs of forced laborers. 200 million DM will be used for administration of the Foundation.

The labor payments will be allocated among the Conference on Jewish Material Claims and five Reconciliation Foundations — in Poland, Ukraine, Russia, Belarus and the Czech Republic — created around the time of German reunification and funded by the German government to make payments to Nazi victims. An additional allocation will be made to an organization or organizations, yet to be designated,

that will cover survivors living in the rest of the world, including the United States.

The Reconciliation Foundations in the five Central European countries will handle payments to all their citizens, including Jewish slave laborers. The Claims Conference will reach surviving slave laborers residing outside these five countries.

The agreed allocations, including an amount of estimated earned interest, are as follows:

Claims Conference	1.812 billion DM
Poland	1.812 billion DM
Ukraine	1.724 billion DM
Russia	835 million DM
Belarus	694 million DM
Czech Republic	423 million DM
Rest of the World	800 million DM
Other Personal Injury (e.g. medical experiments)	50 million DM

The one billion DM for property issues will be divided as follows: 350 million for claims for which there is clear documentation and 650 million for humanitarian cases, in which the certitude of the documentation has been eroded by the passage of time. The humanitarian portion will be further divided between insurance and property. All property and humanitarian claims would go to those who must first certify their property was looted. The 350 DM for claims for which there is clear documentation will be divided even further: 150 million for claims where the taking of property was racially motivated, 50 million for all other property claims and 150 million for insurance claims, which will be supplemented by an additional 50 million DM generated from earned interest from the Foundation capital. There will be an additional reserve of 100 million DM in the Future Fund to cover additional insurance claims, creating the potential for 300 million DM in insurance claims, if required.

In phase three, the German cabinet has submitted to the Bundestag draft legislation creating the Foundation. The German Foundation will be established under German law. We welcome this because the Foundation is the vehicle through which the German Government will appropriate their five billion DM contribution, and because it will subject the Foundation to well established oversight and accountability requirements that charitable organizations in Germany must meet.

On February 16, I had the privilege of testifying before the Bundestag Committee on Domestic Affairs concerning the issues we believe still need to be resolved in the draft legislation creating the Foundation. I was particularly grateful for the opportunity to testify before the Bundestag, recognizing just how unusual it is to have a foreign government official testify concerning domestic legislation. Such an invitation underscores the unique and historic nature of this initiative.

I said in my testimony that the German legislation must embody the elements that are necessary for us to accomplish our goal: the creation of a comprehensive, fair, and transparent Foundation that will make payments to some one million victims of the Nazi era in return for assisting the German companies with achieving legal peace in U.S. courts. In the testimony and in subsequent meetings, I have reiterated that the legislation needs to reflect the compromises and agreements that were reached during the many months of negotiations on the substantive issues. I have reminded the Germans that if it fails to do so, it is unlikely that the plaintiffs' lawyers will in fact agree to dismiss their cases or that the U.S. Government can assist in providing the breadth of legal peace the German companies desire and deserve.

I believe the German Government fully recognizes the importance of passing legislation that the participants and the United States Government can support as faithful to our negotiations, and that it recognizes the importance of creating

a structure and a process that, once enacted, can allow the legal peace German companies seek.

The most significant remaining issue regarding the legislation concerns the scope of the Foundation. The Foundation must be empowered to offer a potential remedy for any conceivable claim against German industry arising out the Nazi era. Without such universality, we will not be able to go before a U.S. court to state that the Foundation offers a remedy, that should be regarded by the court as the exclusive remedy for all Nazi era suits against German companies.

During technical level talks with the German Government and companies this week, we had a productive discussion of this and all of the remaining issues. I am gratified that the Germans reaffirmed their intention to work with us to resolve these outstanding issues on an expedited basis. We understand passage of the legislation is expected by July, which would allow the Foundation to be up and running and to begin making payments by the end of the year.

It is critical for Congress and the American people to understand why the U.S. Government would provide Statements of Interest urging U.S. courts to view the German Foundation Initiative as the exclusive remedy for claims for Nazi-era claims against German companies and to indicate that dismissal of current and future suits is in the foreign policy interests of the U.S. Conventional litigation would be a highly unsatisfactory solution for elderly slave and forced laborers and others injured by German companies during the War. The reasons why the German Foundation Initiative is a superior remedy are as follows:

First, the success of litigation is problematic, given the variety of legal defenses available. Already, federal judges have dismissed two of the cases.

Second, litigation would take years to reach fruition, with lengthy discovery, motions and appeals. Survivors average

around 80 years of age and are passing away at a rate of some one percent a month. Thus, few survivors would benefit from litigation, even if it were successful. Even a classic class action settlement would take years to consummate, as the Swiss bank settlement underscores.

Third, any litigation would benefit only, at best, a small subset of surviving slave and forced workers, compared to the number who would benefit from the German Foundation Initiative. This is because the only survivors who could recover in such litigation are the few thousands who were employed — and could prove it under strict judicial rules — by the few German companies, less than 20, who were sued because they do business in the U.S. and are subject to the jurisdiction of our courts. By contrast, the Foundation Initiative will cover, under relaxed standards of proof, some one million workers, including those who worked for German companies now defunct or not subject to U.S. jurisdiction including SS companies and companies owned by the German government. Indeed, the German legislation will permit the Reconciliation Foundations in Central and Eastern European countries to even pay forced agricultural workers, if they wish to do so. For these groups of people, the Foundation Initiative represents the only possible avenue for obtaining a measure of long-awaited justice.

There has been a good deal of expectation and confusion over who will benefit from the successful conclusion of these negotiations. Let me emphasize a few points:

- American citizens who qualify will receive the same benefits as anybody else, and their applications will be proceeded by an organization or organizations in the U.S. Travel to Germany or elsewhere will not be required.
- If Congress approves, American citizens will be able to exclude their benefits from income under a tax provision in President Clinton's 2001 Budget that provides a clear statutory exemption for Holocaust-related reparations.

- No racial, ethnic or religious group will get favorable treatment. A slave or forced laborer, whether he or she is a Czech, Pole, Jew, Romanian or another nationality or religion will qualify if they meet the required definitions.
- Detailed explanations of exactly who is eligible and how to apply for a benefit will be widely publicized. These important details are still under negotiations. But, please be assured the outreach effort — once a settlement is concluded — will be comprehensive.

I am hopeful all victims, whether or not they will directly benefit, indeed all people of good will, will take real satisfaction in the knowledge that at least deserving Holocaust survivors and other victims of Nazism will get recognition for their suffering and at least some small measure of justice.

Insurance

With the encouragement and public support of the U.S. government, the International Commission on Holocaust Era Insurance Claims (ICHEIC) was established in October 1998 by the National Association of Insurance Commissioners in cooperation with several European insurance companies, European regulators, representatives of several Jewish organizations, and the State of Israel. Chaired by former Secretary of State Lawrence S. Eagleburger, the Commission is charged with establishing a just process that will expeditiously address the issue of unpaid insurance policies issued to victims of the Holocaust. The International Commission launched its full-scale claims and outreach program in February of this year. Using relaxed standards of proof in dealing with outstanding claims from the Holocaust era, the ICHEIC process will ensure the opening of companies' files, the cross-checking of names with Yad Vashem's records of Holocaust victims, and further research into European archives to find names of potential claimants.

Secretary Eagleburger and the International Commission

have supported our efforts in the negotiations to establish the German Foundation. Because the intended beneficiaries of the ICHEIC and the German Foundation are identical with regard to insurance, and because no insurance company should have to pay twice, the International Commission became part of this broader effort when Secretary Eagleburger agreed to work to link the ICHEIC with the Foundation. Secretary Eagleburger's support not only cleared a path for agreement on the insurance portion of the German Foundation allocation, but also helped set the stage for agreement on other allocation issues.

The insurance portion of the German Foundation settlement involves funds destined for the ICHEIC, both for claims and humanitarian purposes, the details of which are as follows:

- 200 million DM were allocated for all insurance claims: 150 million DM for those arising from the German market and from German companies' policies issued outside the German market. This amount also includes the German contribution to ICHEIC administrative expenses. In addition to this amount, a supplemental amount of 50 million DM (to be drawn from interest earned by the Foundation capital) was allocated to cover claims from the non-German markets of German insurance companies.
- 100 million DM will be held in reserve in the German Foundation Future Fund only to be drawn for insurance claims, should they exceed the allocated 200 million DM.
- 350 million DM were allocated for humanitarian purposes.

The German Foundation allocation decisions have not altered the internal workings of the ICHEIC. The legislation that will establish the Foundation recognizes that ICHEIC procedures will govern the processing of all claims against German insurance companies brought to the Foundation. ICHEIC should be, in our view, the exclusive remedy for these claims. The draft legislation before the Bundestag provides that the funds allocated to the Foundation for all insurance claims

payments will be passed through to the ICHEIC; that these funds will include payments for humanitarian insurance purposes and that this money will be for the sole benefit of and administered by ICHEIC.

The issue remaining is whether all German insurance companies will join the International Commission. Count Lambsdorff has on several occasions expressed his confidence that, with the International Commission's approval of this insurance allocation, all German insurance companies that issued policies during the Holocaust era will join both the Foundation and the ICHEIC and follow ICHEIC's claims procedures. He has promised his best efforts to accomplish this goal.

We commend the five European insurance companies that have joined the ICHEIC -- Allianz, Axa, Generali, Winterthur, and Zurich. We strongly encourage all insurers that issued policies during the Holocaust era — especially those in Austria, and those in the Netherlands such as Aegon — to join the International Commission and participate fully in its programs. The ICHEIC is the best and most expeditious vehicle for resolving insurance claims from this period, and membership in the International Commission provides the only real way of both ensuring that valid claims are paid and resolving international moral and humanitarian responsibilities for heirless and nationalized claims or those against companies no longer in existence.

U.S. Government support for the International Commission on Holocaust Era Insurance Claims includes recognition that the MOU signed by the five ICHEIC member companies gives those companies cooperating with the Commission "safe haven" from sanctions, subpoenas, and hearings relative to the Holocaust period. I recently wrote to the state insurance commissioners in Washington State and California, emphasizing my strong support for the international efforts to create a claims settlement process under the International

Commission and stressing that, in their legitimate concern for Holocaust survivors, proposed actions in these states could undermine the work of the ICHEIC.

Austria

The entry of the far-right Freedom Party into a coalition government with one of Austria's mainstream parties, the conservative People's Party, has caused great concern both here and in Europe. President Clinton and Secretary of State Albright have made clear our concerns with past statements of the Freedom Party, which seem to have condoned intolerance and attempted to explain away the Holocaust. However, in the preamble to the coalition agreement, signed by both parties, the new Austrian government has promised to uphold democracy, tolerance and human rights and to condemn discrimination. We are watching developments in Austria closely to ensure that the government lives up to its promises. We will look at what the government does, as well as what it says. One important benchmark in this regard is how the new government will deal with unresolved Holocaust issues.

I am pleased to report progress in the area of forced and slave labor compensation. In early February, the new government appointed the former head of the Austrian central bank, Dr. Maria Schaumayer, as the head of a new office to deal with these issues. In an initial negotiating round on March 20, Dr. Schaumayer outlined to me her government's plans for handling forced and slave labor. The Austrian program would closely parallel the German Foundation Initiative and consist of the following elements:

- a joint effort between the Austrian government and industry;
- coordination with the German effort to assure that the German Foundation covers slave laborers in Austrian concentration camps;
- coverage by the Austrian fund of Hungarian Jews who

were forced into labor outside of the concentration camp system;

- compensation levels that would parallel those in the German effort; and
- coverage for agricultural labor.

She also outlined an ambitious timetable that would involve passage of legislation by July, if the question of legal peace could be resolved by then, and commencement of operation of the fund by the end of this year.

Dr. Schaumayer and I agreed that we would try to have two more meetings on forced and slave labor by the middle of May: one in Washington at the end of April; and Dr. Schaumayer and I will have another round of talks in May in Vienna.

While we are pleased with these commitments, the government also needs to address restitution and compensation issues. There had been a restitution effort in the 1950s and 1960s, but it had some gaps, and there may have been problems with implementation. Dr. Schaumayer said that the Austrian government may take up restitution once forced and slave labor compensation efforts are well underway. Our government will continue to convey to Austrian officials our hope that there can be an acceleration of their efforts on restitution. We hope that Austrian officials understand our concerns, and that the government plans to deal with restitution issues soon. As I have already noted, we will be watching developments in Austria closely to ensure that the government lives up to the preamble in the coalition agreement, and one important benchmark in this regard is how the new government will deal with unresolved Holocaust issues, including restitution.

Swiss Bank Settlement

Swiss banks have agreed to pay $1.25 billion to settle lawsuits brought on behalf of victims who sent their funds to Switzerland for safekeeping and whose heirs had been refused

access to those funds for over fifty years, and other victims with a relationship to the banks. The Volcker Commission found some 26,000 people who very probably had such accounts. The court is in the process of reviewing the fairness of the settlement and is trying, with the help of Yad Vashem in Jerusalem, to find their heirs so they can recover.

There has recently been progress after a four-month delay. Judge Korman, the presiding judge of this Holocaust victims assets case, had postponed his contemplated ruling on the fairness of the settlement to await the Swiss Federal Banking Commission decision on implementation of the Volcker recommendations of December 6. On March 30, the Swiss Federal Banking Commission authorized Swiss banks to publish the 26,000 accounts that are deemed by the Volcker Committee to have a probability of being related to Holocaust victims.

In addition, the Commission authorized the banks to create a central database containing these accounts plus another 20,000 that may be related to Holocaust victims. We hope that the banks continue to support the Claims Resolution Tribunal, which is necessary to process claims relating to the new accounts. We also hope that a database will be put in place in line with the recommendations of the Volcker Committee. In early December, that Committee recommended to the Swiss authorities that the databases and other documentation that were assembled on the approximately 4.1 million accounts that existed in Swiss banks during the 1933-45 period, now dispersed in over 50 locations throughout Switzerland, be centralized in one archive. The Committee believes this is an essential part of the deposit claims resolution process that will consider not only claims to accounts the names of which have already been published, but also claims from other sources. The Board of Trustees of the Claims Resolution Tribunal, which includes members of the Swiss banking community, endorsed this recommendation. Judge Korman also said the recommendation should be implemented. However, the Swiss

Federal Banking Commission stated on March 30 that it viewed this recommendation as neither necessary nor meaningful. I will confer with Paul Volcker on how the objectives of the Committee's recommendations can be achieved and keep this Committee informed.

The stage is now set for other steps that are expected in the near future relating to the Court's access to a refugee database and a list of German companies whose assets were frozen in Switzerland during the War. Once the Court obtains this and other information, such as information relating to insurance matters, it will be in a position to rule on the fairness of the settlement. Thereafter, the Special Master of the Court will be directed to submit his plan of allocation and distribution, and the Court will then hold a final hearing on the settlement.

Nazi Gold

Two massive U.S. government studies were completed in 1997 and 1998. The first discovered that over $4 billion in gold stolen by the Nazis was smelted into gold bars and converted, mostly through the Swiss National Bank, into hard currency the Nazis used to buy what they needed from neutral countries. Six tons of gold still in the hands of the Tripartite Gold Commission was owed to central banks of various nations. We found some of this gold had, in fact, been taken from Holocaust victims, not just from central banks, and had been smelted into disguised gold bars. The second study documented the role of neutral countries in supporting the Nazi war effort.

The December 1997 London Conference on Nazi Gold established the Nazi Persecutee Relief Fund to provide assistance to needy survivors of Nazi persecution. Seventeen countries have pledged $61 million. Congress appropriated $25 million over a three-year period. We allocated the first year's tranche of $4 million to the Conference on Jewish Material Claims Against Germany to provide support to survivors living in Eastern and Central Europe. We are now in the process of allocating the second tranche of $10 million. I am suggesting

that half go for the benefit of former slave and forced laborers, $4.5 million to the Claims Conference and $500,000 to several Holocaust education and research projects.

Art Restitution

At a conference in Washington in December 1998, forty-four nations reached consensus on a set of principles designed to try to find some of the 600,000 artworks stolen by the Nazis and their collaborators and return them to their pre-War owners. Some museums are implementing those principles, along with their own guidelines, to take the initial steps in returning art stolen by the Nazis to its rightful owners. Many of our largest museums have been going through their collections, seeking to identify works that may have been looted by the Nazis.

An excellent example of thorough research has been demonstrated by the National Gallery in Washington in a three-year project. From its inception, the National Gallery has conducted extensive research into the provenance of paintings in its collection, with particular attention over the past several years to the World War II era. The Gallery was in a unique position to accomplish this research because of a number of factors. It was able to devote a knowledgeable researcher full-time to the project. It has always had all its curatorial files on painting and sculpture in its collection physically located in one place. It is in the middle of a multi-year project to publish a systematic catalogue of its entire collection, which entails intense ongoing research on provenance by Gallery curators and outside authors. Its entire collection is on a database which includes all known provenance information. The Gallery's location in Washington makes it relatively accessible to the National Archives in College Park where much of the data needed for Holocaust research is located. And the Gallery itself is the repository of important relevant records, such as the personal papers of people involved in the post-war restitution efforts and records from the Munich Central Collecting Point,

to which stolen art hidden by the Nazis was shipped when uncovered by Allied armies.

In the course of its research, the Gallery discovered that eight paintings in its collection had in fact been looted during the War Archival research, however, uncovered documentation indicating that each of these works had been returned to its rightful owner after the War. A ninth painting, Frans Snyders' *Still Life with Fruit and Game*, was discovered to have gone through the hands of Karl Haberstock, a dealer known to have been involved with looted art. Despite careful research, the ownership history of this painting has not yet been established.

The National Gallery has made its entire collection available on its website, including known provenance information for all paintings and sculpture in the collection. It has made World War II provenance information easily accessible by providing expedited search capabilities, such as the ability to search provenance history by names of former owners and dealers associated with Gallery works of art. The Gallery's curatorial files and its World War II archival resources are also available on-site for research. The Gallery welcomes any information that would augment or clarify the ownership history of objects in its collection. I am submitting for the Record an example of what is available on the National Gallery's website.

The effort is not just confined to the largest museums. The North Carolina Museum of Art announced recently that one of its paintings, "Madonna and Child in a Landscape," by the German master Lucas Cranach the Elder, had been stolen by the Nazis and is actually owned by the heirs of a Viennese physician. In keeping with the Washington Principles, the Museum researched the question of provenance, working in cooperation with the Holocaust Claims Processing Office of the State of New York and the Commission for Art Recovery of the World Jewish Congress and is in the process of returning it.

On the international scene there has been some progress in

the area of art restitution. The Cultural Committee of the Council of Europe prepared model legislation on the return of Jewish cultural property, which the Parliamentary Assembly of the Council adopted last November. We hope this model will engender new legislation on this subject in European national parliaments, similar in scope to the groundbreaking restitution law adopted by Austria in 1998.

The ten national museums and galleries of the United Kingdom are engaged in intensive provenance research to discover works that fall into the category of looted art. They have published, or are publishing, lists of works in their collections, the whereabouts of which, following initial research, cannot with certainty be specified for the whole period 1933-45, and are appealing to the public for help in finding out more information about the provenance of these works. In addition, the United Kingdom has established a "Spoilation Advisory Panel" to hear claims for Nazi-confiscated art.

Germany's Cultural Minister of State recently announced that Germany will inaugurate a website to help restore Nazi-confiscated art to its rightful owners. All major German museums were called upon to inspect the provenance of the artwork in their possession. Any artwork — including coin collections and artifacts — that is found to have unclear provenance will be publicized, with pictures, on the website. Restitution would not be affected by the German Foundation Initiative. This German art initiative follows the lead of the web site the French government has operated for many years to display art returned to France after the War but never claimed.

The Lithuanian Government announced at the end of January that, under the auspices of the Council of Europe, it was inviting representatives of the world community to a forum on cultural properties of Holocaust victims to be held in Vilnius in October.

I would like to include for the record the implementing

principles adopted by the American Association of Museums entitled, "Guidelines Concerning the Unlawful Appropriations of Objects During the Nazi Era." I also ask that the Statement by the Federal German Government, the Laender (Federal States) and the national associations of local authorities on the tracing and return of Nazi-confiscated art, especially from Jewish property, be included in the record of this hearing.

In December 1998, at the Washington Conference, the Russian Delegation invited Holocaust survivors and their heirs to claim looted artwork captured by the Soviet Forces at the end of World War II. The Russian Constitutional Court has upheld legislation that would permit the restitution of art confiscated by the Nazis from victims of persecution. However, this will be a hollow commitment unless Russian art archives are opened. The Russian government subscribed to the Washington Principles on Art and has indicated a willingness to open these archives, but has not as yet done so, at least in part because of financial constraints. We have been approached by several groups interested in cooperating with the Russians on cataloguing art in Russian depositories. We encourage such an initiative and would be happy so facilitate such an effort. One idea is to create an NGO to make grants that would help establish a reliable database of Nazi confiscated art in Russia and assist in the identification of rightful owners.

Communal Property

During the Nazi era, the Germans seized a great deal of property in Central and Eastern Europe that belonged to religious organizations — churches and synagogues. The property was converted into commercial, social and municipal facilities. Jewish communal property was a particular target, as seizing it advanced the Nazi goal of eliminating all traces of Judaism and the Jewish people from the continent.

The successor communist governments for the most part did not restore these properties to their original owners but used them in much the same manner that the Nazis did. Thus when

the Iron Curtain was lifted, the new states of Central and Eastern Europe faced a massive task of deciding how to deal with this property, much of which had been exploited for non-religious purposes for over a half century.

Changing property ownership and use after such an extended period of time is a difficult and complex undertaking. At the same time, governments must realize that honoring property rights is a pre-requisite to participating in the international marketplace and in attracting investment from abroad. While this may be initially expensive and politically sensitive, sound property restitution systems are clearly in the interest of all the Central and Eastern European countries. The nations of Western Europe, as well as the U.S., adhere to high standards when it comes to private property rights, including restitution. As the Central and Eastern European countries are fully integrated into Western institutions, they should realize the importance of sound property restitution laws.

In my discussions with government officials since the mid-1990s, I have emphasized a number of principles that seem to me to be important in addressing property restitution issues. These principles include.

- Equitable, transparent and non-discriminatory procedures to evaluate specific claims.
- Access to archival records and use of alternative forms of evidence if primary documents no longer exist.
- Implementation of restitution policies at national, regional and municipal levels.
- Non-discriminatory procedures, without citizenship or residence requirements.
- Clear and simple legal procedures.
- Implementation of court decisions on the basis of equality and non-discrimination.

- Priority of restitution claims before privatization occurs.
- Provisions for the present occupants of restituted property.
- Transfer of clear title including the right of resale, not simply the right to use property, which could be revoked at a later time.
- Restitution or compensation for communal property irrespective of whether the property had a religious or secular use.
- Establishment of foundations, managed jointly by local communities and international groups, to aid in the preparation of claims and to administer restituted property.
- Protection of cemeteries and other religious sites.

Appended to my written testimony is a country-by-country summary of property restitution issues. There has been some progress since I commenced my activities in this area in 1995, but much remains to be done. Romania, for example, still lacks a comprehensive law on the restitution of private residential property. The newly independent states of the former Soviet Union have dealt with both private and communal property in only a cursory manner.

Poland merits more detailed attention because of the large amount of potentially restitutable private and communal property in that country and recent developments. In September of last year, the Polish government submitted to Parliament private property legislation that was non-discriminatory in terms of allowing former Polish citizens and their heirs who now live outside of Poland to file property claims. However, in December a parliamentary committee added restrictive residency requirements which we believe are discriminatory. We have raised this issue with senior visiting Polish officials here in Washington and our Embassy has raised it in Warsaw. In addition, I believe that Congressman Christopher Smith, Chairman of the Commission on Security and Cooperation in

Europe, sent a letter to the Polish Ambassador to the United States, and other Members of Congress have considered contacting the Parliament directly. Polish government officials have assured us that they strongly favor the draft submitted by the government and are opposed to the amendments. They have promised to work to restore its original intent before it is reported to the floor. Congress' help with the Polish Parliament would be very timely.

Notwithstanding the forthcoming attitude of the Polish government, communal property in Poland poses a special problem as the Holocaust and subsequent emigration has reduced the Jewish community in that country to approximately one percent of the pre-World War II population. The small remaining community has made substantial progress in claiming communal property but it was obvious at the time that communal property legislation was passed approximately three years ago that the community would not be able to claim, manage and maintain the property to which it was entitled without some outside assistance. The answer to this problem appeared to be the establishment of a joint foundation by the World Jewish Restitution Organization and the Polish Jewish communities. Negotiations between the two groups broke down last year. To get the two parties back to the negotiating table, I asked Ambassador Henry Clarke to serve as a mediator. In four negotiating sessions since last fall, Ambassador Clarke has helped the parties to find solutions to some of their differences. I am hopeful that the foundation can be organized in the near future. It would be tragic if further delays prevented the prompt return of communal property in Poland.

Historical Commissions

Eighteen nations currently have commissions examining their role during World War II, some of whom abetted the Nazi cause, gave haven to war criminals and facilitated the flow of confiscated assets. They are: Argentina, Austria, Belgium, Brazil, Croatia, Estonia, France, Italy, Latvia, Lithuania, the

Netherlands, Norway, Portugal, Spain, Sweden, Switzerland, the United Kingdom, and the United States. In addition, the Government of Slovakia has agreed to create a commission. Some commissions have already made their reports, with varying degrees of thoroughness and candor. The most comprehensive thus far have been the two reports published by Switzerland, the first on how Swiss banks helped the Nazis use stolen gold to finance their war machine; and the second on how and why Swiss authorities closed the border to refugees attempting to flee Germany. In our own country, a Presidential Commission headed by Edgar Bronfman is investigating the circumstances under which Nazi money, property and other assets flowed through the hands of the U.S. Government during the War and particularly after the War.

Archives

Archival openness is essential, not only to assist in making claims and advancing scholarship, but so that every country can honestly confront its behavior during these difficult years and draw the lessons needed to advance tolerance and social justice. It is important, for example, that the Russians open up their archives on Raul Wallenberg and museums in all countries allow scholarly and provenance research into their collections.

At a conference in Stockholm last month, attended by delegates from 46 nations, a declaration was agreed to calling for opening up archives containing information on the Nazi-World War II era. In addition, following my request to Count Lambsdorff, he has informed me that many of the companies involved in the German slave/forced labor initiative have agreed to open their archives from this era to legitimate historical research. Some have done so already. We are encouraging the broadest participation of German companies in this effort at openness.

The Vatican has authorized a group of Jewish and Catholic scholars to thoroughly review its collection of published documents from the Nazi era, with the purpose of raising

appropriate issues. The Vatican is both a religious seat and a secular state conducting diplomatic relations. The questions that have been raised concerning Vatican policies during the Nazi era should relate solely to its latter role. This scholarly initiative is a small step forward toward archival openness, in keeping with Pope John Paul's inspirational leadership in bettering Catholic-Jewish relations, most recently exemplified by his moving words at the Holocaust Memorial at Yad Vashem and his symbolic appearance at the Western Wall during his recent trip to the Holy Land. We hope it will lead to additional measures for archival openness.

Education and Remembrance

As we proceed with addressing Holocaust-related issues, it is important to move from money to memory. The last word on the Holocaust should be the memory of its victims and the teaching of its enduring lessons. I had the distinct honor of leading the U.S. delegation to The Stockholm International Forum on the Holocaust in January. The Stockholm Forum, appropriately the first major conference of the new millennium, was an outstanding success and built upon the previous Holocaust conferences held in London and Washington. Twenty heads of state and government and delegations from 46 countries attended. Only his prior commitment to deliver the State of Union address prevented the President from attending.

Delegates committed their countries to promoting Holocaust education and remembrance, encouraging the study of the Holocaust in schools and universities, and in taking all necessary steps to open relevant archives. As embodied in the "Stockholm Declaration," a copy of which I enclose for the Record. These commitments, made by national political leaders, are unprecedented, and in the words of Holocaust survivors with whom I spoke, "monumental" and "historic." Argentina, Bulgaria, Latvia, and Lithuania requested the nine country International Holocaust Education Task Force to begin liaison projects on teaching the Holocaust with them, and,

along with Ukraine, expressed interest in Task Force membership.

The concept of the Stockholm Forum was the personal initiative of Swedish Prime Minister Persson. In addition to the leadership and inspiration he gave to the Forum, he also demonstrated exceptional political leadership in exploring the historical truth of Sweden's wartime neutrality and in remembering the horrible crimes of the Holocaust era.

The work of the International Holocaust Education Task Force continues. It is translating the experience and expertise gained in teaching the Holocaust in countries that are members of the Task Force to other countries, helping them to develop Holocaust education and remembrance in their societies. There has been a successful project in the Czech Republic aimed at training in the teaching of the Holocaust, and similar projects have been requested by other countries.

To help support such activities, the Task Force last month established an endowment fund, to be administered by the Swedish Ministry of Foreign Affairs. Our government strongly supports this fund, and hopes to be able to announce a contribution in the near future.

In the same Stockholm Declaration of which I spoke, the participating nations committed their countries to promoting Holocaust education and remembrance, and encouraging the study of the Holocaust in their schools and universities.

Presidential Commission on Holocaust Assets in the United States

Mr. Chairman, my friend and partner in many of these endeavors, Edgar M. Bronfman, is testifying here today in his role as Chairman of the Presidential Advisory Commission on Holocaust Assets in the United States. While I am a member of that Commission, I will defer to him and not address the Commission's work today.

I would like to note to the Committee that on March 28, the President sent to the Congress a supplemental appropriations bill that included $1.4 million for the Presidential Commission.

In the course of the Presidential Commission's work, we have discovered new areas of inquiry that must be examined. Among the projects the supplemental would support are a review of agreements that may have existed between the United States and Western European countries regarding the restitution of property to individuals; a review of bank and travel agent records of assets transferred to the United States by Holocaust victims; and the cross-matching of names of Holocaust victims with unclaimed property lists.

Because the Presidential Commission will deliver its final report by the end of December, it is extremely important that these authorized funds be appropriated as soon as feasible so that the Commission can make use of them while it is still conducting its research. We have urged other countries to establish historical Commissions to examine their own nations' role during that period. We have urged them to be complete and transparent in their research. We can do no less.

The Administration strongly supports this proposal, and I ask the members of the Senate to act on it expeditiously.

Nazi War Criminal Records Interagency Working Group

The Nazi War Crimes Disclosure Act calls for identification, declassification and public access to millions of pages of Nazi war criminal records by a deadline of January 2002. The Nazi War Criminal Records Interagency Working Group (IWG) oversees the project, which includes searching for records, analyzing them, monitoring and auditing the declassification process, maintaining a IWG database, preparing and describing the records for presentation to the public in usable form, and assuring that war-time records in poor physical condition survive to be seen by the public. This last includes copying, microfilming, digitizing, and

conservation treatment of highly acidic, yellowing, and crumbling wartime paper. The work the IWG is doing very important work, none more important to the public and to the future than assuring that the records survive.

APPENDIX H

Agreement
between the Government of the
Federal Republic of Germany and
the Government of the United States of
America concerning the Foundation
"Remembrance, Responsibility and the Future"

The Government of the Federal Republic
of Germany and the Government
of the United States of America

Intending to shape relations between their two States in a spirit of friendship and cooperation for the future and to successfully resolve issues stemming from the past,

Recognizing that the Federal Republic of Germany has, building on Allied legislation and in close consultation with victims' associations and interested Governments, provided, in an unprecedented manner, comprehensive and extensive restitution and compensation to victims of National Socialist persecution,

Noting the historic announcement on February 16, 1999, made by the Federal Chancellor and German companies, in which the companies stated their intention to establish a foundation to compensate forced laborers and others who suffered at the hands of German companies during the National Socialist era and World War II,

Noting that, by means of the Foundation Initiative, its member companies wish to respond to the moral responsibility of German business arising from the use of the forced laborers and from damage to property caused by persecution, and from all other wrongs suffered during the National Socialist era and World War II,

Recognizing as legitimate the interest German companies have in all-embracing and enduring legal peace in this matter, and

further recognizing that such interest was fundamental to the establishment of the Foundation Initiative,

Noting that the two Governments announced that they welcomed and support the Foundation Initiative,

Noting that the Federal Republic of Germany and German companies have since agreed on the creation of a single Foundation, "Remembrance, Responsibility and the Future" (the "Foundation"), formed under German federal law as an instrumentality of the Federal Republic of Germany and funded by contributions from the Federal Republic of Germany and the German companies,

Recognizing that German business, having contributed substantially to the Foundation, should not be asked or expected to contribute again, in court or elsewhere, for the use of forced laborers or for any wrongs asserted against German companies arising from the National Socialist era and World War II,

Recognizing that it is in the interest of both parties to have a resolution of these issues that is non-adversarial and non-confrontational, outside of litigation,

Recognizing that both parties desire all-embracing and enduring legal peace to advance their foreign policy interests,

Noting in this regard the June 16, 2000, letter of the Assistant to the President of the United States for National Security Affairs and the Counsel to the President of the United States and the July 5, 2000, letter of the Foreign Policy and Security Advisor of the Chancellor of the Federal Republic of Germany, copies of which have been made public,

Having worked as partners, in consultation with other interested parties and governments, to assist German companies to achieve wide support for the total amount of funds and the eligibility criteria of the Foundation and for the establishment of all-embracing and enduring legal peace,

Noting that the Foundation will assure broad coverage of

victims and broad participation by companies which would not be possible through judicial proceedings,

Believing that the Foundation will provide as expeditious as possible a mechanism for making fair and speedy payments to now elderly victims,

Having in mind that the Foundation covers, and that it would be in the interests of both parties for the Foundation to be the exclusive remedy and forum for addressing, all claims that have been or may be asserted against German companies arising from the National Socialist era and World War II,

Recalling that for the last 55 years the parties have sought to work to address the consequences of the National Socialist era and World War II through political and governmental acts between the United States and the Federal Republic of Germany,

Noting that this Agreement and the establishment of the Foundation represent a fulfillment of these efforts,

Recognizing that the German Government has tabled a Bill before the German Federal Parliament ("Bundestag") to establish the Foundation —

Have agreed as follows:

Article 1

(1) The parties agree that the Foundation "Remembrance, Responsibility and the Future" covers, and that it would be in their interests for the Foundation to be the exclusive remedy and forum for the resolution of, all claims that have been or may be asserted against German companies arising from the National Socialist era and World War II.

(2) The Federal Republic of Germany agrees to ensure that the Foundation shall provide appropriately extensive publicity concerning its existence, its objectives and the availability of funds.

(3) Annex A sets forth the principles that shall govern the operation of the Foundation. The Federal Republic of Germany assures that the Foundation will be subject to legal supervision by a German governmental authority; any person may request that the German governmental authority take measures to ensure compliance with the legal requirements of the Foundation.

(4) The Federal Republic of Germany agrees that insurance claims that come within the scope of the current claims handling procedures adopted by the International Commission of Holocaust Era Insurance Claims ("ICHEIC") and are made against German insurance companies shall be processed by the companies and the German Insurance Association on the basis of such procedures and on the basis of additional claims handling procedures that may be agreed among the Foundation, ICHEIC, and the German Insurance Association.

Article 2

(1) The United States shall, in all cases in which the United States is notified that a claim described in article 1(1) has been asserted in a court in the United States, inform its courts through a Statement of Interest, in accordance with Annex B, and, consistent therewith, as it otherwise considers appropriate, that it would be in the foreign policy interests of the United States for the Foundation to be the exclusive remedy and forum for resolving such claims asserted against German companies as defined in Annex C and that dismissal of such cases would be in its foreign policy interest.

(2) The United States, recognizing the importance of the objectives of this agreement, including all-embracing and . during legal peace, shall, in a timely manner, use its best efforts, in a manner it considers appropriate, to achieve these objectives with state and local governments.

Article 3

(1) This agreement is intended to complement the creation of

the Foundation and to foster all-embracing and enduring legal peace for German companies with respect to the National Socialist era and World War II.

(2) This agreement shall not affect unilateral decisions or bilateral or multilateral agreements that dealt with the consequences of the National Socialist era and World War II.

(3) The United States will not raise any reparations claims against the Federal Republic of Germany.

(4) The United States shall take appropriate steps to oppose any challenge to the sovereign immunity of the Federal Republic of Germany with respect to any claim that may be asserted against the Federal Republic of Germany concerning the consequences of the National Socialist era and World War II.

Article 4

Annexes A, B and C shall be an integral part of this Agreement.

Article 5

This Agreement shall enter into force on the date on which the parties agree by exchange of notes.

DONE at Berlin on the 17th day of July 2,000, in duplicate in the German and English languages, both texts being equally authentic.

For the Government of the Federal Republic of Germany
/s/

For the Government of the United States of America
/s/

Annex A
of the Agreement between
the Government of the Federal Republic
of Germany and the Government of the
United States of America concerning the Foundation
"Remembrance, Responsibility and the Future"

Principles Governing the Operation of the Foundation

Article 1(3) of the Agreement provides that the principles governing the operation of the Foundation will be set forth in Annex A. This Annex reflects key elements of the Foundation that form a basis for the Parties' mutual commitments in the Agreement.

1. The Foundation legislation will state that the purpose of the Foundation is to make payments through partner organizations to those who suffered as private and public sector forced or slave laborers and those who suffered at the hands of German companies during the National Socialist era and to establish a "Remembrance and Future Fund" within the Foundation. It will state that the permanent task of the "Remembrance and Future Fund" is to support projects that (a) serve to promote understanding between nations, and serve social justice and international cooperation in the humanitarian sector; (b) support youth exchange programs and keep alive the memory of the Holocaust and the threat posed by totalitarian, unlawful regimes and tyranny; and (c) also benefit heirs of those who have not survived.

2. The Foundation legislation will provide for a Board of Trustees that consists of an equal number of members appointed by the German Government and German companies and by other governments and victims' representatives, except that the Chairman shall be a person of international stature appointed by the Chancellor of the Federal Republic of Germany. The Board may be reduced in size after four years, but the balance of the membership

will continue, to the extent appropriate. The Board will adopt by-laws by a two-thirds majority vote. All Foundation operations will be transparent and by-laws and similar procedures will be made public.

3. The Foundation legislation will provide that the Foundation will be audited by the Federal Accounting Office and that all partner organizations will also be audited.

4. The Foundation legislation will provide that persons who were held in concentration camps as defined under the Federal Compensation Law ("BEG") or in another place of confinement or ghetto under comparable conditions and were subject to forced labor ("slave laborers") will be eligible to receive up to DM 15,000 each. The Foundation legislation will also provide that persons who were deported from their homelands into the territory of the 1937 borders of the German Reich or to a German-occupied area, and were held in prison-like or extremely harsh living conditions ("forced laborers") not covered by the above definition will be eligible to receive up to DM 5,000 each. In addition, from the allocated funds to make payments to forced laborers, partner organizations will be authorized to make payments to others who were forced to work during the National Socialist era. These other forced laborers will receive up to DM 5,000 each. The eligibility of all laborers covered by the Foundation will be limited to survivors and heirs, as defined under paragraph 8, of those who died after February 15, 1999. In addition, victims of "other non-labor personal injury wrongs," including, but not limited to, medical experimentation and *Kinderheim* cases, will be eligible to receive payments, within the limits of the amount allocated for that purpose. Victims of medical experimentation and *Kinderheim* cases are given priority over other non-labor personal injury wrongs. The eligibility of a victim to receive benefits for all "other non-labor personal injury wrongs" will not be affected by whether or not he or she

also receives benefits for forced labor. The funds allocated for "other non-labor personal injury wrongs" will constitute a separate allocation. The partner organizations will receive, review, and process applications for payments from the amount allocated for "other personal injury." At the request of a partner organization, the property committee referred to in paragraph 11 will appoint an independent arbitrator to review and process applications to the particular partner organization. The amount allocated will be distributed to each partner organization so that each approved applicant is provided a pro-rata amount of the total amount for all approved "other personal injury" applicants. The decisions of the partner organizations and any arbitrator that may be appointed will be based on uniform standards approved by the Board of Trustees. The F ndation legislation will provide that any costs associated with reviewing and processing applications, including those associated with an arbitrator (if selected), will be drawn from the allocations for each partner organization. Excess amounts in the labor category allocated to any partner organization under the distribution plan annexed to the Joint Statement will be reallocated to labor, with the aim of reaching equal levels of payments to former slave and forced laborers wherever they reside. The Board of Trustees will be entitled to authorize payments above per capita ceilings should circumstances warrant.

5. The Foundation legislation will provide that a slave or forced laborer will not be able to receive payments for the same injury or wrong from both the Foundation and the Austrian Foundation for Reconciliation, Peace and Cooperation.

6. The Foundation legislation will provide that persons who suffered loss of or damage to property during the National Socialist era as a result of racial persecution directly caused by German companies are eligible to recover under the payment system set forth in paragraph 11. The eligibility of

such persons will be limited to those who could not receive any payment under the BEG or Federal Restitution Law ("BRueckG") because they did not meet the residency requirement or could not file their claims by the deadline because they lived under a government with which the Federal Republic of Germany did not have diplomatic relations, those whose claims were rejected under the BEG or BRueckG where legal proof became available only after the reunification of the Federal Republic of Germany, provided the claims were not covered by post-reunification restitution or compensation legislation, and those whose racially-motivated property claims concerning moveable property were denied or would have been denied under the BEG or BRueckG because the claimant, while able to prove a German company was responsible for seizing or confiscating property, was not able to prove that the property was transferred into then-West Germany (as required by law) or, in the case of bank accounts, that compensation was or would have been denied because the sum was no longer identifiable, where either (a) the claimant can now prove the property was transferred into then-West Germany or (b) the location of the property is unknown.

7. The Foundation legislation, by making available the amount of 50 million DM, will provide a potential remedy for all non-racially motivated wrongs of German companies directly resulting in loss of or damage to property during the National Socialist era. The Foundation will refer such matters for review and processing to the committee referred to in paragraph 11. All funds allocated to payment for property matters will be distributed within those categories.

8. The Foundation legislation will provide that the heirs eligible to receive payments under paragraphs 6 and 7 consist of the spouse or children. In the absence of the victim, spouse and children, then payments under these

paragraphs will be available to grandchildren, if alive; if not, to siblings, if alive; and if there are neither grandchildren nor siblings, to the individual beneficiary named in a will.

9. The Foundation legislation will provide that all eligibility decisions will be based on relaxed standards of proof.

10. The Foundation legislation will provide that legal persons will be allowed to make claims on behalf of individuals when those individuals have given powers of attorney. The Foundation legislation will also provide that where an identifiable religious community has suffered damage to or loss of community property, as distinct from individual property, resulting directly from the wrongs of a German company, a duly authorized legal successor may apply for payment to the committee referred to in paragraph 11.

11. The Foundation legislation will establish a three-member committee for property matters (paragraphs 6 and 7). The United States and the Federal Republic of Germany will each appoint one member; these two members will appoint a Chairman. A secretariat will be largely responsible for the initial review of applications. The Foundation legislation will require the Committee to establish simplified procedures, including simplified and expedited internal appeals. The Committee will not have the authority to reopen any case that has been finally decided by a German court or administrative body, or that could have been decided by application in time, except as specified in paragraph 6. All of the Committee's expenses will be funded from the amount allocated for property claims and the funds will be subject to audit.

12. The Foundation legislation will provide that the Committee referred to in paragraph 11 will distribute the funds allocated to it on a pro-rata basis.

13. The Foundation legislation will make clear that receipt of

payment from Foundation funds will not affect the recipient's eligibility for social security or other public benefits. There will be offsets for prior compensation payments made by German companies for forced labor and other National Socialist era injustices, even if made through third parties, but there will be no offsets for any prior Government payments.

14. The Foundation legislation will provide that each applicant for a Foundation payment will be required to state that, upon receipt of a payment from the Foundation, he or she will waive any and all alleged National Socialist era claims against German companies and all National Socialist era labor and property damage claims against the German Government. Such a waiver will not preclude applicants from being eligible to receive payments under the Foundation legislation for other wrongs, for example other personal injuries or loss of property, or any combination thereof. Such a waiver also will not preclude an applicant from bringing an action against a specific German entity (i.e., Government agency or company) for the return of a specifically identified piece of art if the action is filed in the Federal Republic of Germany or in the country in which the art was taken, provided that the applicant is precluded from seeking any relief beyond or other than the return of the specifically identified piece of art.

15. The Foundation legislation will provide that each partner organization will create an internal appeals procedure.

16. The Foundation legislation will require that the Foundation provide appropriately extensive publicity concerning the benefits that the Foundation will offer and how to apply. The Board of Trustees, in consultation with the partner organizations, will determine the form and content of such publicity.

17. The Foundation legislation will allow applications to be made to the partner organizations for at least eight months

after the enactment of the Foundation law.

18. The Foundation legislation will authorize the Foundation and its partner organizations to receive information from German Government agencies and other public bodies that is necessary for the fulfillment of their responsibilities, in so far as this is not contrary to particular statutes or regulations or the legitimate interests of the persons concerned.

19. The Foundation legislation will enter into force no later than when the funds of the Foundation are made available to it.

Annex B
of the Agreement between
the Government of the Federal Republic of
Germany and the Government of the
United States of America concerning the Foundation
"Remembrance, Responsibility and the Future"

Elements of U.S. Government Statement of Interest

Pursuant to Article 2, Paragraph 1, the United States will timely file a Statement of Interest and accompanying formal foreign policy statement of the Secretary of State and Declaration of Deputy Treasury Secretary Stuart E. Eizenstat in all pending and future cases, regardless of whether the plaintiff(s) consent(s) to dismissal, in which the United States is notified that a claim has been asserted against German companies arising from the National Socialist era and World War II.

The Statement of Interest will make the following points:

1. As indicated by his letter of December 13, 1999, the President of the United States has concluded that it would be in the foreign policy interests of the United States for the Foundation to be the exclusive forum and remedy for the resolution of all asserted claims against German companies arising from their involvement in the National Socialist era and World War II, including without limitation those relation to slave and forced labor, Aryanization, medical experimentation, children's homes/*Kinderheim*, other cases of personal injury, and damage to or loss of property, including banking assets and insurance policies.

2. Accordingly, the United States believes that all asserted claims should be pursued (or in the event Foundation funds have been exhausted, should timely have been pursued) through the Foundation instead of the courts.

3. As the President said in his letter of December 13, 1999, dismissal of the lawsuit, which touches on the foreign

policy interests of the United States, would be in the foreign policy interests of the United States. The United States will recommend dismissal on any valid legal ground (which, under the U.S. system of jurisprudence, will be for the U.S. courts to determine). The United States will explain that, in the context of the Foundation, it is in the enduring and high interest of the United States to support efforts to achieve dismissal of all National Socialist and World War II era cases against German companies. The United States will explain fully its foreign policy interests in achieving dismissal, as set forth below.

4. The United States' interests include the interest in a fair and prompt resolution of the issues involved in these lawsuits to bring some measure of justice to the victims of the National Socialist era and World War II in their lifetimes; the interest in the furtherance of the close cooperation this country has with our important European ally and economic partner, Germany; the interest in maintaining good relations with Israel and other Western, Central, and Eastern European nations, from which many of those who suffered during the National Socialist era and World War II come; and the interest in achieving legal peace for asserted claims against German companies arising from their involvement in the National Socialist era and World War II.

5. The Foundation is a fulfillment of a half-century effort to complete the task of bringing justice to victims of the Holocaust and victims of National Socialist persecution. It complements significant prior German compensation, restitution, and pension programs for acts arising out of the National Socialist era and World War II. For the last 55 years, the United States has sought to work with Germany to address the consequences of the National Socialist era and World War II through political and governmental acts between the United States and Germany.

6. The participation in the Foundation not only by the German Government and German companies that existed during the National Socialist era, but also by German companies that did not exist during the National Socialist era, allows comprehensive coverage of slave and forced laborers and other victims.

7. Plaintiffs in these cases face numerous legal hurdles, including, without limitation, justiciability, international comity, statutes of limitation, jurisdictional issues, *forum non conveniens*, difficulties of proof, and certification of a class of heirs. The United States takes no position here on the merits of the legal claims or arguments advanced by plaintiffs or defendants. The United States does not suggest that its policy interests concerning the Foundation in themselves provide an independent legal basis for dismissal, but will reinforce the point that U.S. policy interests favor dismissal on any valid legal ground.

8. The Foundation is fair and equitable, based on: (a) advancing age of the plaintiffs, their need for a speedy, non-bureaucratic resolution, and the desirability of expending available funds on victims rather than litigation; (b) the Foundation's level of funding, allocation of its funds, payment system, and eligibility criteria; (c) the difficult legal hurdles faced by plaintiffs and the uncertainty of their litigation prospects; and (d) in light of the particular difficulties presented by the asserted claims of heirs, the programs to benefit heirs and others in the Future Fund.

9. The structure and operation of the Foundation will assure (or has assured) swift, impartial, dignified, and enforceable payments; appropriately extensive publicity has been given concerning its existence, its objectives, and the availability of funds; and the Foundation's operation is open and accountable.

Annex C
of the Agreement between
the Government of the Federal Republic of
Germany and the Government of the
United States of America concerning the Foundation
"Remembrance, Responsibility and the Future"

Definition of "German Companies"

"German companies," as used in Article 1(1) and Article 2(1), are defined as in Sections 12 and 16 of the legislation establishing the Foundation "Remembrance, Responsibility and the Future," as follows:

1. Enterprises that had their headquarters within the 1937 borders of the German Reich or that have their headquarters in the Federal Republic of Germany, as well as their parent companies, even when the latter had or have their headquarters abroad.

2. Enterprises situated outside the 1937 borders of the German Reich in which during the period between January 30, 1933, and the entry into force of the legislation establishing the Foundation "Remembrance, Responsibility and the Future," German enterprises as described in Sentence (1) had a direct or indirect financial participation of at least 25 percent.

3. "German companies" does not include foreign parent companies with headquarters outside the 1937 borders of the German Reich in any case in which the sole alleged claim arising from National Socialist injustice or World War II has no connection with the German affiliate and the latter's involvement in National Socialist injustice, unless there is pending a discovery request by plaintiff(s), of which the United States is provided notice by the defendant with copy to plaintiff(s), seeking discovery from or concerning World War II or National Socialist era actions of the German affiliate.

APPENDIX I

NEWS

THE WHITE HOUSE

Office of the Press Secretary

For Immediate Release March 29, 2001

JOINT STATEMENT BY
PRESIDENT GEORGE W. BUSH AND
CHANCELLOR GERHARD SCHROEDER ON A
TRANSATLANTIC VISION FOR THE 21ST CENTURY

The United States of America and the Federal Republic of Germany are linked by a deep friendship. Our meeting today opens a new chapter in our close relationship. At the beginning of the 21st century, we reaffirm our common commitment to the lasting principles which are at the basis of the Transatlantic community of values – freedom, democracy and human rights. On this basis, we are resolved to strengthen and further develop the partnership between the United States of America and Europe. In the age of globalization we want to give it a new quality.

We agree that our cooperation within the Atlantic Alliance continues to be of decisive importance for the security and stability of the Euro-Atlantic region and that this includes an adequate military presence of the United States in Europe. The Atlantic Alliance has adapted itself to the historic changes in Europe after the end of the Cold War and today also plays an important role in promoting stability in the states of Central, Eastern, and Southeastern Europe. The openness of the Alliance for new members and its offer of a comprehensive partnership to the new democracies on the European continent contribute to peace and security in all of Europe. They are directed against

no one.

We share the view that Russia can make an important contribution to maintaining peace and stability in Europe and the world. We encourage the Russian government to further pursue a policy of democratic reforms and offer our cooperation to this end.

We will be partners for the states in Southeastern Europe on their way into a peaceful future. War, aggressive nationalism and extremist acts of violence must belong to the past. We will lend our support to the process of stabilization and democratization in the Balkans, continuing to act in close consultation and jointly. In these efforts, the Stability Pact will continue to play a central role.

Both our countries have long-standing commitments to the territorial integrity of Macedonia. We strongly condemn the violence perpetrated by a small group of extremists trying to destabilize that country's democratic, multi-ethnic government. Their violent methods are hurting the long-term interests of ethnic Albanians in Macedonia, Kosovo, and throughout the region. We strongly support President Trajkovski and the Macedonia government in taking proportionate steps to prevent further violence and urge that they work closely with elected representatives of the Macedonian Albanian community to address legitimate minority concerns. We welcome steps being taken by NATO, the European Union, and the OSCE to help Macedonia contain the insurgents as well as to facilitate a political solution.

We are convinced that the uniting Europe will enrich Transatlantic relations. From the beginning, the United States of America has offered its support to European unification, for a Europe that is strong and capable lies in the interest of the United States just as much as Europe needs a strong American partner. Therefore we view the development of a European Security and Defense Policy as an important contribution to sharing the burden of securing peace which will strengthen the

Atlantic Alliance.

The United States and Germany welcome the efforts of the European Union to assume greater responsibility for crisis management by strengthening capabilities and developing the ability to take actions where NATO as a whole chooses not to engage. In this regard, the United States welcomes the European Union's European Security and Defense Policy (ESDP), aiming at making Europe a stronger, more capable partner in deterring and managing crises affecting the security of the Transatlantic community. This involves:

- Developing EU capabilities in a manner that is fully coordinated, compatible, and transparent with NATO;
- The fullest possible participation by non-EU European NATO members in the operational planning and execution of EU-led exercises and operations, reflecting their shared interests and security commitments as NATO members;
- Working with other EU members to improve Europe's capabilities and enables the EU to act where NATO as a whole is not engaged.

Together we are resolved to undertake new efforts in countering the proliferation of weapons of mass destruction (WMD) and increasingly sophisticated missiles for their delivery. We agree on the need for substantive bilateral consultations, as well as close consultations with other allies and interested parties. We will work together toward a post-Cold War strategy that increases our common security and that encompasses the appropriate mix of offensive and defensive systems, and that continues nuclear arms reductions and strengthens WMD and missile proliferation controls as well as counter-proliferation measures.

We are resolved to increase our efforts to abolish barriers impeding trade between the European Union and the United States of America. In areas where we have differences of opinion we will strive to bring our positions closer together.

In the framework of G-7/8 we will contribute to helping the poorest countries in drawing more benefit from technological development, in particular in the field of information technology. Together we will also increase our efforts towards bringing about a stable global finance system. This will also be of help in overcoming hunger, poverty, and disease in large parts of the world that represent a challenge to all of us.

We share a common concern about global climate change. We openly note that we differ on the best way to protect the earth's climate. The Federal Republic of Germany, host of the Climate Change Conference in Bonn in July, emphasizes that the targets to reduce greenhouse gases agreed in Kyoto are indispensable to combat global climate change effectively. The United States opposes the Kyoto Protocol because it exempts many countries from compliance and would cause serious harm to the American economy. Both sides, however, are prepared to work constructively with friends and allies to solve the problem. In this context they deem it necessary to develop, among other means, technologies, market-based incentives, and other innovative approaches to meeting the challenge of global climate change.

We attach particular importance to the fight against HIV/AIDS. We want the G-7/8 to intensify their efforts to ease the suffering of millions of people who are inflicted by this disease. We consider it to be of particular importance for the pharmaceutical industry to take additional measures so that HIV/AIDS patients in affected developing countries can be supplied with medication at affordable prices.

We welcome the agreements on the establishment of the German Foundation Remembrance, Responsibility, and the Future for compensation payments to former forced laborers. We note with great satisfaction that the German companies now have made available their total share in the Foundation. We call for a swift implementation of the agreements on all-embracing and enduring legal peace so that payments to the aged former

forced laborers can begin as soon as possible.

German-American friendship constitutes a pillar of Transatlantic relations. It must continue to be based on broad popular support in the new century. To this end, we will, on both sides of the Atlantic, encourage even more contacts among members of the younger generation.

APPENDIX J

Statement
by
Ambassador Randolph M. Bell
Special Envoy for Holocaust Issues
U.S. Department of State
Washington, DC

to the
U.S. House of Representatives
Committee on Government Reform
Subcommittee on Government Efficiency, Financial Management and Intergovernmental Relations

September 24, 2002

Mr. Chairman, I appreciate the opportunity to appear before the subcommittee today concerning H.R. 2693, the "Holocaust Victims Insurance Relief Act." The United States Government is committed to securing equitable compensation for Holocaust victims. In pursuit of that goal, we have facilitated prolonged, intense international negotiations and entered into several bilateral agreements to secure speedy resolution of claims. We recognize the importance of ensuring that unpaid insurance policies, issued in Europe during the Holocaust era, are honored, and we have worked steadily to support international cooperative efforts to address and resolve Holocaust-era insurance issues. We recognize and salute the active role of the United States Congress in this cooperative effort.

While we appreciate the purpose behind H.R. 2693 — to provide information about Holocaust-era insurance policies to potential claimants — we have serious concerns with this legislation and the negative impact it could have on the implementation of agreements we have concluded with several countries for the specific purpose of securing payment of

survivors' claims.

This legislation's demand for information from European companies on activities that took place in Europe more than 50 years ago, under the threat of sanctions, is contrary to longstanding U.S. policy that matters of Holocaust-era restitution and compensation should be resolved through negotiation, cooperation and dialogue. If passed, this legislation could hinder or prevent important work that a number of established institutions are undertaking to help provide a dignified measure of justice to Holocaust survivors and their families worldwide.

This legislation also would undermine our policy of support for the International Commission on Holocaust Era Insurance Claims ("ICHEIC"), which has reached agreements with European insurers on publication of lists of policyholders who were likely to have been victims of Nazi persecution and has conducted research into public archives throughout Europe and published the results on the Internet. The mandate for broad disclosure of information regarding all policies issued in Europe from 1933 to 1945 — as opposed to information only on those policies issued to individuals who were likely to have been Holocaust victims — could result in the publication of thousands of names of individuals whose claims would not be eligible for payment and the subsequent creation of unrealistic public expectations. It is also highly likely that some policyholders and/or their heirs will object strenuously to publication on the grounds that it violates their privacy.

U.S. Policy

With regard to claims for restitution or compensation by Holocaust survivors and other victims of the Nazi era, it is the policy of the U.S. Government that concerned parties, foreign governments, and nongovernmental organizations should act to resolve matters of Holocaust-era restitution and compensation through dialogue, negotiation and cooperation. Since the end of World War II, the United States has worked in numerous ways

to achieve restitution and compensation for Nazi victims. These efforts also include the work of the United States military during the immediate postwar period.

Recent activities include negotiations that culminated in the creation, under German law, of the Foundation, "Remembrance, Responsibility and the Future" ("Foundation"). In addition to the Foundation, the United States also has encouraged participation in the International Commission on Holocaust Era Insurance Claims (ICHEIC), a voluntary organization that has established procedures for the processing and payment of Holocaust-era insurance claims. As part of the German Foundation agreement, the German Government agreed that insurance claims against German insurance companies will be processed on the basis of claims-handling procedures established by the ICHEIC and any other procedures that have been agreed among ICHEIC, the Foundation, and the German Insurance Association ("GDV"). A 2001 bilateral U.S. agreement with Austria provides that up to $25 million will be made available from the Austrian General Settlement Fund to cover claims against those Austrian insurance companies that are not already covered through ICHEIC or the German Foundation, and that claims will be processed by an independent panel using ICHEIC claims-handling procedures. In addition, under the U.S.-Swiss Joint Economic Commission ("JEC"), our two countries pledged to support the efforts of the ICHEIC to address Holocaust-era insurance issues expeditiously.

ICHEIC is a voluntary organization that was established in October of 1998 by the National Association of Insurance Commissioners ("NAIC"), in conjunction with several European insurance companies, European regulators, representatives of several Jewish organizations, and the State of Israel. The Association of Insurers in the Netherlands later joined ICHEIC on behalf of the entire Dutch insurance industry. The entire German and Austrian insurance industries are committed to using ICHEIC procedures for Holocaust-era

claims as described above.

The U.S. Government has supported ICHEIC since its establishment and believes that it should be viewed as the exclusive remedy for unresolved insurance claims from the National Socialist era and World War 11.

Since April 2000, ICHEIC has published 59,244 names (relevant to 86,472 insurance policies) in a searchable format on its website, www.icheic.org. The names come from a variety of sources, including research ICHEIC conducted in various European public archives and from lists of policyholders that were provided by ICHEIC member companies and then cross-matched with Yad Vashem's database of Holocaust victims. ICHEIC is expected to publish an additional 2,000 names on its website this week.

The United States welcomed the September 19 announcement by ICHEIC Chairman Lawrence S. Eagleburger that an agreement had been reached with the German Foundation on the processing and payment of insurance claims against the entire German insurance industry. The Administration has strongly supported efforts to conclude the insurance agreement so that valid claims can be paid and humanitarian funds distributed during claimants' lifetimes. With this agreement, some $100 million from the German Foundation will be made available to pay valid insurance claims against German companies and $175 million will be distributed by ICHEIC for humanitarian purposes.

A chief component of the ICHEIC-Foundation agreement includes detailed provisions for former Jewish residents of Germany and their heirs to soon have access to the most comprehensive listing ever available of insurance policies issued to Jewish residents of Germany during the National Socialist era. The listing will be developed using information on Jews living in Germany from the 1939 national census that has been compiled by the German Federal Archive, as well as emigration and deportation lists and other registers of German

Holocaust victims from various archival sources that have been recommended by experts. German insurance companies with existing electronic databases will provide information on policyholders, which will be matched with the listing compiled from the census and archival registers. Furthermore, the agreement provides that the ICHEIC claims database, which contains a significant percentage of claims that do not name a specific company, will be cross-matched with an electronic list of policies provided by German insurance companies.

As is the case with names currently published on ICHEIC's website, the listing generated from the provisions in the ICHEIC-Foundation agreement will be used to assist potential claimants. All actual claims will be researched by the companies using all of their records, regardless of whether the names are in an electronic format.

The U.S. Government understands that the members of ICHEIC — especially those representatives of the Conference on Jewish Material Claims Against Germany, the Jewish Agency for Israel, representatives of the State of Israel, U.S. state insurance regulators, and individuals who are themselves Holocaust survivors — all accept the ICHEIC-Foundation agreement as a valid and worthy result. They have endorsed the agreement's key provisions for publishing the most comprehensive list possible of German policyholders who may have been Holocaust victims.

All parties within ICHEIC have worked intensely for the past two years with the German Foundation to resolve the details of cooperation and establish a credible resolution mechanism for claims made against all German insurance companies. If passed, H.R. 2693 would undermine the agreement between ICHEIC and the Foundation, as well as ICHEIC's previous efforts — all of which have been supported by victims' and other Jewish organizations and U.S. state insurance regulators — to publish the names of policyholders who were likely to have been Holocaust victims.

We share the frustration of many with the slow pace of progress on paying Holocaust-era insurance claims. But after two years of negotiations, the parties have reached an agreement to do exactly what this legislation seeks to have them do — that is, to create usable lists of Holocaust-era insurance policies to facilitate the filing and payment of claims. That agreement should be given the opportunity to succeed. This legislation, however, would impose contradictory obligations, and potentially undermine the cooperation on which the recent agreement is based. In other words, passage of this legislation could frustrate or prevent attainment of the very goals it seeks to achieve.

Although based on legitimate concern for Holocaust survivors, sanctions such as those envisioned by H.R. 2693 divert attention from cooperation to confrontation and could undermine the work of the German Foundation, the ICHEIC and the Austrian General Settlement Fund and the objectives of the U.S.-Swiss Joint Economic Commission. Threats interfere with the conduct of international business, especially in the cases of insurance companies that have agreed to participate in the ICHEIC claims process to pay outstanding claims from the National Socialist era. Punitive measures will shift the focus away from the claims resolution we all desire to a debate over those actions.

In conclusion, it is the Department of State's view that H.R. 2693 would not be in the best interests of claimants on Holocaust-era insurance policies, many of whom are elderly Holocaust survivors, who have waited for justice that has been too long denied. I urge you, Mr. Chairman, and members of the subcommittee, to take this into account during your consideration of a bill that puts undue pressure on European insurers to report to the Department of Commerce, rather than through internationally agreed channels, and detracts from the public interest in furthering the purposes of institutions that have widespread national and international support and seek to help claimants receive a measure of justice in their lifetimes.

I thank you for the opportunity to appear before you today.